TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1169~~. 759

ALEXANDER BRUCE AND WILLIAM SHEPARD,
APPELLANTS,

vs.

THE MANCHESTER & KEENE RAILROAD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

FILED OCTOBER 23, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Circuit Court of the United States for the District of New Hampshire.

UNITED STATES OF AMERICA, *District of New Hampshire*, } ss:

At a stated term of the circuit court of the United States for the district of New Hampshire, begun and holden at Concord, within and for the district of New Hampshire, on the eighth day of October, A. D. one thousand eight hundred and eighty-three, before the Honorable Daniel Clark, district judge, presiding, the following proceedings were had, to wit:

ALEXANDER BRUCE and others, Complainants,

vs.

THE MANCHESTER AND KEENE RAILROAD and others, Defendants.

The bill of complaint in this cause was filed in the clerk's office on the twenty-fourth day of October, A. D. 1881, and was duly entered at the May term of this court, A. D. 1882, and is in the words and figures following, namely:

2 United States Circuit Court, District of New Hampshire.

To the honorable the judges of the circuit court of the United States for the district of New Hampshire:

Your orators, Alexander Bruce, of Marseilles, in the State of Illinois, and a citizen of said State of Illinois; John Shepard, of Lowell, in the State of Massachusetts, and a citizen of said State of Massachusetts; and the Boston & Lowell Railroad Corporation, a corporation established by law in Massachusetts, and a citizen of said State of Massachusetts, who are respectively the creditors of the Manchester & Keene Railroad, under certain notes or bonds called mortgage bonds, and secured by a deed of trust or mortgage of said railroad in behalf of themselves
3 and of all other like creditors, not being citizens of New Hampshire, who may come in and contribute to the expenses of this suit, bring this their bill of complaint against the Manchester & Keene Railroad, a corporation established by law in the State of New Hampshire, and a citizen of said State of New Hampshire; and against the Nashua & Lowell Railroad Corporation, a corporation also established by law in the State of New Hampshire, and a citizen of said State; and against Farnum F. Lane, of Keene; J. Wilson White, of Nashua, and Cornelius V. Dearborn, of Nashua, all of said State of New Hampshire, and citizens of said State; and against George A. Ramsdell, of Nashua; James A. Weston, of Manchester, and John Kimball, of Concord, also of New Hampshire, and citizens of said State of New Hampshire; and against Samuel W. Hale and Henry Colony, both of Keene, and citizens of said State of New Hampshire; and against John G. Scruton and William P. Frye, both of the city of Lewiston and State of Maine, and citizens of

said State [of] Maine; and against Charles H. Campbell, of
4 Nashua, in the State of New Hampshire, and a citizen of said State of New Hampshire.

And thereupon your orators complain and say:

That the Manchester & Keene Railroad was duly incorporated by act of the Legislature of New Hampshire passed July 16, 1864, with the powers set forth in its charter, and in subsequent acts, to which your orators crave leave to refer for greater certainty; that said corporation was duly organized under its said charter, and proceeded to build, and did build, its railroad between Greenfield and Keene, in said State of New Hampshire, as thereby authorized; that said Manchester & Keene Railroad, on or about the 29th day of May, 1878, issued its negotiable notes, or obligations, bearing date July 1, 1876, and payable July 1, 1896, with interest at six per cent. per annum, with coupons therefor, payable semi-annually, to the
5 amount, in all, of $500,000, or thereabouts; and to secure said notes, or obligations, so issued the said railroad duly executed a deed of trust, or mortgage, of its railroad and franchise, and all property thereof then existing, or to be thereafter acquired, to the defendants, Lane, White, and Dearborn (said mortgage being dated May 29, 1878), as trustees, for the future owners or holders of said notes or obligations; to which deed of mortgage or trust your orators crave leave to refer, and to make the same a part of this bill of complaint.

And your orators show that said notes or bonds, and all of them, have been negotiated by said railroad and passed unto the hands of *bona fide* holders thereof for value, and are now outstanding against said railroad in the hands of your orators and others, and that the money realized by said company from said bonds was expended in building said railroad, and that said railroad could not otherwise have been built at all, and the said Lane, White, and Dear-
6 born became parties to said deed of trust as parties of the second part, or executed the same for that purpose; and the said Lane, White & Dearborn thereby became bound to the persons then or thereafter holding the said notes, or obligations secured by said trust deed to perform or discharge the trust so undertaken by them faithfully for the use and benefit of the holders of said notes or bonds, and to administer the said trust in the manner stated and set forth in said deed of trust in every respect.

And your orators show that they are respectively the owners and holders of said notes or bonds amounting in the aggregate to $90,000 of principal, upon which there is now overdue and unpaid *in* large amount of interest, viz., the sum of $20,000, or thereabouts, and that the interest is overdue and wholly unpaid on all of said issue of $500,000, and has been so for several years past.

And your orators show that they have applied to the said
7 trustees, requesting them to take measures for the purpose of realizing the amount of the interest so in default on said bonds, and all of them, out of the possession and earnings of said railroad, and out of the rent derivable from a lease thereof to others, as is provided in said deed of trust; but the said trustees, though in

duty bound to take and pursue such measures, have declined and refused so to do, in breach of their trust and duty to your orators, and all the other owners and holders of said bonds, and by so doing have rendered it necessary for your orators to pursue such remedies as they may be entitled to under the said deed of trust in their own name.

And your orators show that they are informed and believe that the defendants, Hale, Colony, Scruton & Frye, sometimes pretend that they hold some claim or demand against said railroad or its property thereof which is prior in right of lien to the lien created by said deed of trust or mortgage, which your orators deny to be the case; but your orators aver that if, upon the in-
8 vestigation to be had in this honorable court, it shall be found that said defendants, or any of them, do hold any such lien or demand upon said railroad having priority of right over said bonds secured by mortgage, then your orators are willing, and they hereby offer, in behalf of all the said bondholders, mortgagees beneficially under said mortgage, that they will pay and satisfy such prior lien, asking to be subrogated to all benefits thereof as a prior security to said mortgage.

Your orators are also informed and believe that the Nashua & Lowel Railroad Corporation, defendant, makes a like claim of priority of lien upon so much of said Manchester & Keene Railroad as lies easterly of Hancock Junction, and the orators make the same offer of payment of such claim if it shall be found by this court to be entitled to priority of lien over the bonds secured by said mortgage or deed of trust.

You orators further show they are informed and believe that the defendants, Ramsdell, Weston & Kimball, are in fact in pos-
9 session of the Manchester & Keene Railroad, and pretend to be authorized and empowered to make a sale of said railroad, and threaten to offer and expose the said railroad for sale at public auction, at Keene, to the highest bidder, and may execute their said threat and induce some person or persons to bid for or buy the same at their pretended sale.

And your orators are informed and believe, and therefore charge, that said Ramsdell, Weston, and Kimball, as pretended trustees under said mortgage, with the defendant Campbell, employed by them, have combined with the said Hale and Colony and Frye and Scruton, the other defendants, for the purpose of effecting a pretended sale of said railroad in the pretended exercise of the power of sale in said mortgage contained, and that it is understood and agreed between them that the said Hale, Colony, Frye, and Scruton, or some of them, shall purchase the same at said pretended sale, at a nominal price, equal, or about equal, to the amount of the alleged prior lien claimed by the said Hale and Colony
10 against said railroad, and that the price so bid by them, or by some one for them, is not to be paid in money, but by the discharge of the said pretended claim or prior lien; and your orators charge that in this way it is intended by the said defendant to pay off and satisfy in full said pretended prior claim or lien of

said defendants, and thus to postpone the security of the notes or bonds held by your orators and the other bondholders, and to deprive them of the benefit of such security, and to render their bonds wholly worthless; and in case this plan shall be consummated, and some one other than these defendants shall become the pretended purchaser at such sale, then your orators ask leave to join such pretended purchaser, when ascertained, as a defendant to this bill of complaint.

To the end, therefore, that the defendants may severally appear and make answer to this bill of complaint (an answer on oath being hereby waived), and that an account may be taken of what
11 is due and owing to the orators and all other holders of said notes or bonds, secured by said mortgage of May 29, 1878, and now payable thereon, and that said Manchester & Keene Railroad may be ordered to pay and satisfy the same at some short day to be fixed by the court, together with the costs of this suit, and in default thereof that the said Lane, White, and Dearborn, as trustees under said mortgage, or that such other persons, if any there be, who may or shall have succeeded to the office of trustees under said deed of trust, in pursuance of the terms of said deed, in the place and stead of said Lane, White, and Dearborn by lawful right, may be required by order of this honorable court to take possession of said Manchester & Keene Railroad, and of all property embraced in said mortgage, and either to operate the same personally and take the earnings thereof, or else to lease said railroad to be operated by others at a rental for the benefit of said bondholders, as is provided in and by said deed of trust, and that the said Hale and
12 Colony and Frye and Scruton and Campbell and any other person or persons, who may or shall become the pretended purchaser or purchasers of said railroad, at said pretended sale, may be restrained by order of this honorable court from resisting the said Lane, White, and Dearborn in the discharge of their duties under the said mortgage, pursuant to the directions of this court, and that your orators may have such other and further relief in the premises as may be fit and proper—

May it please your honors to grant unto your orators a writ of subpœna in due form, directed to the Manchester and Keene Railroad, the Nashua & Lowell Railroad Corporation, Farnum T. Lane, J. Wilson White, Cornelius V. Dearborn, George A. Ramsdell, James A. Weston, John Kimball, Samuel W. Hale, Henry Colony, and Charles H. Campbell, all within said district of New Hampshire, and John G. Scruton and William P. Frye, in case they can
13 be found within said district, the said Scruton & Frye not, however, being necessary parties to this bill of complaint, commanding them, and each of them, to appear before this hon. court, on a rule day to be therein named, then and there to make

answer to this bill, and to abide the order, judgment, and decree of the court thereon.

ALEXANDER BRUCE.
JOHN SHEPARD.
BOSTON & LOWELL RAILROAD CORPORATION,
By F. A. BROOKS.

F. A. BROOKS,
Solicitor for Complainants.

14 And on the eleventh day of December, A. D. 1882, the Boston & Lowell Railroad Corporation, one of the complainants, on its motion was allowed to withdraw as a party complainant to said suit, and the bill was dismissed as far as said Boston & Lowell railroad, as one of the complainants, was concerned.

The answer of the Manchester & Keene Railroad was filed on the 11th day of January, A. D. 1883. The bill was dismissed as to Weston, Ramsdell, and Kimball by stipulations filed in the case, and was discontinued as to White, Dearborn, and Lane.

The answer of the Manchester & Keene Railroad is in the words following:

15 *The Answer of the Manchester & Keene Railroad.*

Circuit Court of the United States, District of New Hampshire. In Equity.

ALEXANDER BRUCE & *a.*

v.

THE MANCHESTER & KEENE RAILROAD & *a.*

These defendants admit that said Manchester & Keene Railroad was duly incorporated, with the powers set forth in its charter and in subsequent acts; that said corporation was duly organized under its said charter, & built its railroad between Greenfield & Keene as thereby authorized; that the Manchester & Keene Railroad, on or about the 29 day of May, 1878, issued its negotiable notes or obligations to the amount of 500,000, & duly executed *of* trust or mortgage of its railroad & franchise, & all property thereof then existing, or to be thereafter acquired, to the defendants, Lane, White, and Dearborn, as trustees for the future owners or holders of said notes or obligations, the said deed of mortgage or trust being made & executed for the security of said notes and obligations, as in

16 the plaintiffs' bill of complaint is alleged.

These defendants further say that said mortgage was supplemental to an earlier mortgage from said Manchester & Keene Railroad, dated September 19, 1876, and duly recorded September 20, 1876, in which the defendant Lane was the only trustee when said additional mortgage was made as additional security for said $500,000 of bonds, to which earlier mortgage these defendants ask leave to refer, and these defendants say that all said $500,000 of

bonds outstanding are valid claims secured by said earlier mortgage, as well as by said supplemental mortgage.

These defendants admit that the said Bruce is a citizen of Illinois, & that said Shepard is a citizen of Massachusetts, but whether either of them is the owner of any of said bonds they are not informed, and therefore they deny the allegation thereof, and they aver that from their knowledge of the outstanding bonds
17 aforesaid, if the said Bruce & Shepard own or hold any of such bonds they are for any small amounts; and these defendants say that in their belief the said Bruce & Shepard have not joined in this suit on their own motion or for their own interest, but have been induced and procured to allow their names to be used as nominal plaintiffs by one Francis A. Brooks, who has heretofore represented himself as solicitor for the said Boston & Lowell Railroad Corporation, plaintiff, (but without authority from the said Boston & Lowell Railroad Corporation, as these defendants are informed and believe), and who is also president and solicitor of the Nashua & Lowell railroad, originally named as a defendant in said bill; and that this suit is in substance and effect the suit solely of the said Nashua & Lowell railroad, and is not in any substantial way the suit of the said Bruce & Shepard. And these defendants say that the said Boston & Lowell Railroad Corporation has been by this court permitted to withdraw, and has withdrawn, from any
18 connection with this suit as a party plaintiff therein.

These defendants admit that said Boston & Lowell Railroad Corporation at the time of the filing of the bill in this case were the holders of some of the bonds aforesaid, and aver that since the foreclosure of said mortgage and the ratification thereof by the supreme court of the State of New Hampshire, as hereinafter set forth, the said bonds have been negotiated and transferred by the said Boston & Lowell Railroad Corporation to Henry C. Sharburne & C. E. A. Bartlett, as trustees for the said Boston and Lowell Railroad Corporation and Concord Railroad Corporation, in equal proportions.

The said Boston & Lowell Railroad Corporation procured all the bonds which it so held, amounting to the sum of $112,000 of principal, from said Brooks, representing said Nashua & Lowell Railroad, on or about the first day of October, 1880; and these defend-
19 ants say that it was then agreed that in case a certain lease then made of the Nashua & Lowell to said Boston & Lowell Railroad Corporation for ninety-nine years should be in any way annulled, the said Brooks should repurchase for said Nashua & Lowell railroad said $112,000 of bonds at the price for which they had been sold, so that this suit is in fact only promoted by the said Nashua & Lowell railroad, which is really a plaintiff therein, while it has been named in said bill as a defendant.

These defendants admit that the interest on said bonds, & on all the issue of $500,000, is overdue and unpaid, and has been for several years past.

These defendants have no knowledge of any application by any of the plaintiffs to said Lane, White & Dearborn, trustees, request-

ing them to take measures to realize the interest so in default on said bonds as charged in said bill, and therefore deny the fact.

These defendants admit that the defendants Hale, Colony, Scruton & Frye pretended to hold a claim or demand against
20 the said Manchester & Keene Railroad and the property thereof, prior in right of lien to that created by the mortgages aforesaid.

These defendants admit that the Nashua & Lowell railroad makes a claim of priority of lien upon so much of the said Manchester & Keene Railroad as lies easterly of Hancock Junction, the validity of which claim is denied.

These defendants admit that the defendants Ramsdell, Weston, and Kimball were, when the bill in this suit was filed, in possession of the said Manchester & Keene Railroad, and pretended to be authorized & empowered to sell the same at public auction to the highest bidder, & were endeavoring to induce persons to bid for and buy the same, and that they, as trustees, and the defendant Campbell, employed by them as their auctioneer, had the purpose of effecting a sale of said railroad, in the exercise of power of sale con-
21 tained in said mortgage, but these defendants deny any knowledge or belief that there was any understanding or agreement that the said Hale, Colony, Scruton, Frye, or any of them, should purchase said railroad at a nominal price, equal or about equal to said prior lien claimed by the said Hale and Colony against said railroad, or that the price bid by or for them should not be paid in money, but by the discharge of said claim or prior lien; and these defendants deny any understanding or intention by them or any of the defendants by any such purchase to pay off and satisfy in full said prior claim or lien, & thus postponed the security of the bonds held by the plaintiff & other bondholders, & to deprive them of the benefit of such security, & to render their bonds worthless, as charged in said bill.

These defendants say that on the 22d day of April, 1880, the defendants Hale, Colony, Frye, & Scruton commenced a suit in equity in the supreme court of the State of New Hampshire, in the
22 county of Hillsborough, against said Nashua & Lowell railroad, said Manchester & Keene Railroad, & said White and Dearborn, trustees, to which suit said Lane was subsequently made a party defendant, wherein they prayed for the removal of said White and Dearborn, trustees, and the appointment of other persons as trustees in their stead; that, as preliminary to a bondholders' meeting to elect trustees under the New Hampshire statute, a list of bondholders entitled to vote might be prepared, under the supervision of the court, that in case of delay in the appointment or election of new trustees a receiver might be appointed of the said Manchester & Keene Railroad, for the protection and preservation thereof; that there might be a foreclosure of said mortgages, and for certain orders and decrees not material to be herein recited.

These defendants aver that under said bill in equity, after full appearances & hearing of all the defendants therein, Mr.
23 Chief Justice Doe, on the 30th of April, 1880, appointed George A. Ramsdell receiver of the Manchester & Keene Railroad.

On the 27th of July, 1880, the said chief justice made a further order authorizing the said Lane, White & Dearborn, trustees, to take possession of said railroad for the purpose of operating the same under said mortgages and under section 6 of chapter 165 of the general laws New Hampshire, said trustees to inform the receiver on or before Aug. 9, 1880, whether they would undertake to operate the road under said order. On the 18th day of August, 1880, the said chief justice and three associate justices of said supreme court made an order removing said Dearborn & White as trustees, & appointing in their places, and in place of said Lane, trustee, who had resigned, the defendants in this suit, James A. Weston, George A. Ramsdell, & John Kimball trustees, under said mortgages, & authorizing them to act as trustees under the aforesaid order of July 27, 1880, and transferring to them all power,
24 authority, rights, & duties of said former trustees. Answers were duly made in said suit in equity in said supreme court of the State of New Hampshire by all the defendants. The bill had been amended by making said Lane a party defendant, & by making it a proceeding in behalf of all the holders of bonds who should choose to come in, and holders of many bonds did come in as parties plaintiff, & among others said Nashua & Lowell Railroad by said Brooks as its attorney, filed a formal written paper making itself a party plaintiff, & thereby joining in all the allegations of the bill. Replications were filed and the case came on for trial of all questions of fact, in due form, before the supreme court aforesaid, at a trial term thereof held at Nashua, in said county of Hillsborough, & was fully heard on the 5th day of October, 1880, all the defendants having appeared, & findings of fact were made by the justice presiding at said term & said trial; said findings sustaining all the
25 averments in the bill which had been denied in the answers; and the questions of law arising upon said trial & said findings of facts were reserved and transferred to the law term of said supreme court. Said cause came to hearing before said law term, December 9, 1880, and said Brooks furnished a brief for said Nashua & Lowell railroad, and oral *agreement* was heard, and on March 18, 1881, a decision was rendered in favor of the plaintiffs therein on all points, & the case was remanded for decrees at the then next trial term in said county of Hillsborough in accordance with said decision.

At the May term, 1881, of said supreme court, in said county of Hillsborough, it was ordered, among other things, that a certain lease of the Manchester & Keene Railroad to the Nashua & Lowell railroad, recorded Oct. 25, 1877, be declared inoperative against the bonds issued under the mortgages of said Manchester & Keene Railroad aforesaid; that the appointment of said Weston, Ramsdell, & Kimball, trustees, to execute the trusts under said mortgages
26 be confirmed, & said trustees be made parties to said bill; that a list of bondholders be prepared, and a bondholders' meeting held for the election of trustees, if desired by the bondholders; that the appointment of said Ramsdell as receiver be confirmed, & the expenditures made by him as such receiver, with funds fur-

nished by the said Hale, Colony, Frye, & Scruton, in preserving and fitting for operation the said Manchester & Keene Railroad, be made a first lien upon said road & its appurtenances, and that a default and breach of the conditions of said mortgages be adjudged to have taken place by the non-payment of interest, and to have continued for a period of six months and upwards, and that said Manchester & Keene Railroad was insolvent & unable to pay the same, or to respond to any further demand therefor, or for the principal of said bonds, and that the case had arisen for the foreclosure by sale of said railroad, its property and franchises, at auction, as is in said mortgage provided.

27 At the May trial term, 1881, of said court, it was further ordered that notice be given, by publication, for the presentation of bonds by their holders, on or before Aug. 15, 1881, with a view to a bondholders' meeting for the election of trustees, and on Sept. 2, 1881, an order was also made allowing a bondholders' meeting, and providing that after such meeting the trustees duly elected at the same might proceed to foreclose said mortgages by sale, acting in all respects in accordance with the provisions of the mortgage deeds, and in case no application for a bondholders' meeting should be made within ten days from said Sept. 2, then that the trustees appointed under the order of Aug. 18, 1880, might proceed to make foreclosure as aforesaid.

No application was made for a bondholders' meeting in accordance with said order of Sept 2, 1880, & none has ever been held. On the third day of said Sept. holders of a majority of bonds outstanding requested said Weston, Ramsdell, & Kimball,

28 trustees, to proceed to sell at public auction all the property & franchises of said Manchester & Keene Railroad, in accordance with the terms & provisions of said mortgages, and said Boston & Lowell railroad (which had on the first day of Oct., 1880, as hereinbefore stated, become the possessor of said bonds to the amount of $112,000, previously held by the Nashua & Lowell railroad) signed said requests by its attorney.

In accordance with said mortgages & said order of court said Weston, Ramsdell & Kimball, on the 21st day of September, 1881, made due public advertisement that in order to execute the trusts under said mortgages they would offer for sale to the highest bidder at public aution, on Wednesday, Oct. 26, at 12 o'clock noon, at the Cheshire Hotel, in Keene, said Manchester & Keene Railroad, and its property and franchise, all as described in and conveyed by said mortgages, the sale to be subject to ratification by said

29 court, and on said day and at said hour & place, by said Campbell as auctioneer, said trustees offered for sale said railroad property and franchises, and there was competition therefor, and said defendant, Samuel W. Hale, bid $125,000 therefor, and the same were thereupon sold to said Hale, subject to all lawful liens thereon, estimated at $57,436.87, to all unpaid land damages, and to the result of the litigation arising upon the bill in equity to which this answer is made, the subpœnas upon which had been served upon several of the defendants on the day previous to the sale, but not

disclosing the nature of the suit, and which was not then known. Subsequently, at the then pending September trial term of said supreme court for said Hillsborough county, the presiding justice ordered that the consideration of said trustees' report of said sale to said defendant Hale, and of the motion of the plaintiffs in said
30 suit there pending for confirmation thereof, then & there made, be postposed until Tuesday, Nov. 22, 1881, at 11 o'clock in the forenoon, at Nashua, in said county, at which time and place all parties to said suit in equity, and all other persons interested, might be heard, and also ordered due publication of said order in newspapers in New Hampshire and Boston, and personal service thereof upon said Francis A. Brooks, solicitor for the plaintiffs in this present suit in equity, which publication & service were duly made. And on said 22d day of Nov. such hearing was had, and the said Brooks filed objections in behalf of said Nashua & Lowell railroad, and said Manchester & Keene Railroad; and on the said 22d day of November, 1881, all the proceedings of said trustees were ratified & confirmed, and said sale of said Manchester & Keene Railroad, its property and franchises, to said defendant, Samuel W. Hale, for $125,000, was duly approved by said supreme court of New Hampshire, and said trustees were authorized to execute a deed in
31 accordance therewith; to this order and decree the said Nashua & Lowell railroad and the said Manchester & Keene Railroad, by said Brooks, acting as their attorney, excepted, and said exceptions were reserved for the consideration of the full bench, and were by said tribunal duly heard and considered, and at the March term of said court, 1882, by the final judgment of the full bench of said supreme court of New Hampshire, the said exceptions were overruled. With this final judgment and decree of said supreme court these defendants, now answering, are content, and have no desire, if they had the power or right, to make any resistance thereto.

And the defendants aver that by the aforesaid suit & proceedings in the said supreme court of the State of New Hampshire, commenced April 22d, 1880, and terminated at the March term of said court, 1882, and said court obtained full and lawful jurisdiction of said Manchester & Keene Railroad, its property & franchises,
32 and of the foreclosure of the mortgage thereof, that such jurisdiction cannot be taken away or concurrent or superior jurisdiction assumed in proceedings in behalf of any holders of bonds, either in this circuit court or elsewhere, but all such bondholders are bound by the orders, decrees, & judgment of said supreme court, finally & conclusively adjuci-ated.

Wherefore these defendants pray that the bill to which this answer is made be dismissed with costs.

THE MANCHESTER &KEENE RAILROAD,
By WM. L. FOSTER, *Their Solicitor.*

33 And several of the other defendants on whom the subpœna was served also came and filed their answers to said bill, and the said bill was afterwards, by leave of court or the consent of parties, dis-

missed or discontinued against all the defendants, excepting the Manchester & Keene Railroad, and the other answers are not here transcribed.

And afterward, to wit, on the 12th day of Feb., A. D. 1883, came the complainants, by their solicitor, and filed their replication to the answer of the Manchester & Keene R. R., as follows:

34 *Replication of Alexander Bruce & Wm. Shepard to the Answer of the Manchester & Keene Railroad.*

U. S. C. Court, District of New Hampshire.

ALEXANDER BRUCE & *als.*

v.

MANCHESTER & KEENE R. R. & *als.*

These repliants, saving, etc., etc., for replication to the answer of the Manchester & Keene Railroad, say: That they will aver and prove their said bill to be true, certain, and sufficient in law to be answered unto, and that the answer of said Manchester & Keene Railroad is uncertain, untrue, and insufficient to be replied to by these repliants, without this, etc., etc.

And they humbly pray as in and by their said bill they have already prayed.

By F. A. BROOKS &
JOHN R. BULLARD,
Their Solicitors.

35 The evidence taken in behalf of the complainants and filed in the cause consisted of the deposition of Jno. R. Bullard, Cornelius V. Dearborn, J. Wilson White, and William Shepard, which were admitted and read at the hearing without objection, and were in the words following, to wit:

Deposition of John R. Bullard.

JOHN R. BULLARD, being first duly sworn, did depose & say in answer to inter-ogations proposed by FRANCIS A. BROOKS, of counsel for the complainant, as follows, to wit:

Int. 1. State your age, residence, & occupation.

A. Age, 37; residence, Dedham; I am a member of Suffolk bar, practicing in Boston.

Int. 2. What relations have you had professionally to Alex'r Bruce, one of the plaintiffs in this case; when did such relations commence, & what action have you taken, if any, as attorney or as counsel for said Bruce, relating to any bonds of the Manchester and Keene Rail road? State fully.

36 A. In the spring or early summer of 1881 I was employed by Alex'r Bruce, of Marseilles, Ills., as counsel to protect his interest as a bondholder in the Manchester & Keene Rail road, of New Hampshire, and to collect the overdue coupons on seven

or eight of the bonds of that railroad, which belonged to him, & he placed in my hands seven of the first mortgage 6 per ct. gold bonds of that railroad of $1,000 each, and one of said mortgage bonds for $500, with the coupons thereto belonging, beginning with the one due Jan. 1, 1879, in the $1,000 bonds (being coupons No. 5), and of the coupons due July 1, 1879, on the bonds of $500, and being coupons No. 6. These bonds and coupons I here produce to be marked for identification. Each of these bonds are dated July 1, 1876, & are made payable July 1, 1896. Those for $1,000 are numbered 173 to 179, inclusive. The bond for $500 is numbered 43. There are seven detached coupons for the payment of $30.00, each also produced, & in like manner marked "I."

Upon investigation in Mr. Bruce- behalf, I concluded that it
37 would be wise to authorize Mr. F. A. Brooks, of Boston, to join Mr. Bruce as a party complainant in a bill which he was about to bring in the United States circuit court for the district of New Hampshire. I thereupon did so authorize Mr. Brooks, & notified Mr. Bruce of what action had been taken, and I understand that the bill was brought and is still pending, and it is the suit in which I am now testifying, and that I have the right to take an active part in said case; and that my name appears on the record as counsel, I having been informed as to the various proceedings in the case, and have had interviews with Col. George, who claimed to represent the defendant, corporation, or the Boston & Lowell railroad, which corporation was at one time party to the suit.

JOHN R. BULLARD.

Subscribed and sworn to, July 19, A. D. 1883, before me—
WILLIAM H. HACKETT.
Special Examiner.

38 *Deposition of Cornelius V. Dearborn, taken July* 19, 1883.

I, CORNELIUS V. DEARBORN, being first duly sworn, depose and say, in answer to interrogatories proposed by F. A. BROOKS, Esq., of counsel for the complainant, as follows:

Int. 1. State your age, residence, and occupation.

A. My age is 51 years; residence, Nashua, N. H.; I am a lawyer & an examiner of national banks for the State of New Hampshire.

Int. 2. If you are one of the defendants in this suit, and also one of the trustees named in a certain mortgage of the Manchester & Keene Railroad, dated May 29, 1878, and one of the parties who executed said mortgage, will you produce a copy of said mortgage, to be annexed as a part of your answer, and state what took place regarding said mortgage after conveyance of said road to your trust under said mortgage?

39 Ans. I am one of the defendants in this suit and one of the trustees named in the mortgage referred to, and I now produce and hand to the examiner a copy of said mortgage, to be annexed to this my answer.

(This is marked Exhibit A, No. 178, July 19, 1883, W. H. H., Ex.)

Five hundred thousand dollars of said bonds were executed and placed in the hands of the trustees, and by the trustees certified as secured by the first mortgage. I identify bond No. 84 for $1,000, put in evidence by William Shepard, as one of said bonds. All the other bonds were of like tenor, though of other denominations. The bonds were left with me to be delivered to the parties who were entitled to receive them. I had the custody of them for all the trustees. A larger part of said bond- were issued and negotiated.

Int. 3. Whether or not you were one of the defendants in a suit brought by Samuel W. Hale, Henry Colony, J. Y. Scruton, and William P. Frye in the supreme court of New Hampshire
40 for Hillsborough county, and were ordered to appear therein at a term of the court holden on the first Tuesday of September, 1880, at Nashua, N. H., and what time was said suit brought?

A. I was one of the defendants in said suit, the bill in which was filed in the office of the clerk on the 22d day of April, 1880. The other defendants were the Nashua & Lowell Railroad Corporation, the Manchester & Keene Railroad, and J. Wilson White, of Nashua, N. H., one of the trustees under said mortgage. Mr. Lane, the third trustee under said mortgage, was not named as a defendant in said bill. Mr. White and myself filed an answer to said bill as defendants, and a copy of said answer is referred to by me as evidence of the contents of the same. I have no copy with me, and cannot therefore state the contents of the same.

Int. 4. At or before the commencement of the suit of said Hale and others were you or the other trustees, or either of them, ever called upon by or in behalf of the plaintiffs in that suit, or by the holders of any of said mortgage bonds, to take any proceed-
41 ings whatever as trustee under said mortgage or for the benefit of the mortgage bondholders?

A. We never were. They never made any complaint that we did not do our duty as trustees that I ever heard of until the filing of that bill. Nor do I understand that in the bill there was any alleged delinquency in the performances of our duties as trustees.

Int. 5. It is provided in said mortgage deed, in case of any default in the payment of the bonds or interest which has continued for the period of six months, the trustees may declare the principal of notes or bonds payable on demand, and thereby make the principal payable forthwith, and may then demand payment thereof, and if the M. & K. R. R. fail to pay the same within ten days after such demand the trustees may offer the same at public auction and make sale of the same. Whether or not yourself, White, and Lane ever took any action under the provision of said mortgage, or were ever requested to by any bondholders under said mortgage at any time?

42 A. We never did take any such action, and no request was ever made upon us so to do.

Int. 6. When first did you learn that any action was to be taken by the court in said Hale case upon the question of removal of yourself, White, and Lane as trustees under said mortgage?

A. There was a hearing in Manchester on 27 July, 1880, before

Judge Doe, and George A. Ramsdell had previously been appointed receiver, and was in possession of the road as such. On July 27 Judge Doe passed an order authorizing the trustees to take and operate the railroad, and cause the same to be operated or furnished with funds, to be provided for that purpose by others, and we were informed that the court would be together at Old Orchard Beach on or about the 10th of August, where further action could be had if necessary. I went to Old Orchard Beach and was there on the 10th of August, and the court was there informed that the trustees, no funds having been put into their hands with which to complete the road, were unwilling to take possession of and operate the road. I had no knowledge that any motion was made by the plaintiff in the suit for the removal of the trustees or for any action to be taken in regard to the trustees.

43 Int. 7. When and how did you first learn that the judges of the supreme court of New Hampshire had taken any action upon the subject of removal of Lane, White, and yourself as trustees under this mortgage, or any reasons of the action taken therein?

A. After going before the judges at their room in the hotel at Old Orchard Beach, we went away from the house where they stopped, & returned to our own lodgings at the Ocean House, and the first notice I had was some time during the afternoon of the same day. I saw the paper which I now hold in my hand, and produce to be hereto annexed as part of this answer, which gave me the first and only information of the act of the court at that time. This paper is written in pencil & is in these words (addressed on outside as follows): "Mr. F. A. Brooks, Wm. W. Bailey, & Wm. E. Chandler, Ocean House," and on the inside reads, "Aug. 10, 1880. An order will be made as soon as may be, removing all the trustees & appointing Gov. Weston, Ramsdell, & Jno. Kimball, of Concord, in their places as trustees under the mortgages & under the order of July 27th, 1880. C. Doe."

44 The original paper is attached, marked No. 178 "W. H. H., ex'r, July 19, 1883, Exhibit B."

I will add Mr. F. F. Lane, our co-trustee, was also present at the time. I did not understand that any request was made at that time for the removal of the trustee, or that any evidence was adduced upon the subject, or that the plaintiffs at that time asked or desired such removal, nor was I then aware, nor am I now aware, of any cause that justified such proceedings on the part of the judges. I was informed that Mr. Lane, one of my co-trustees, in consequence of the order for removal, resigned as trustee, and so notified the judge, so that the order of removal should only apply to Mr. White and myself.

Int. 8. Whether or not the trustees at any time and where were called upon by F. A. Brooks, as attorney for sundry bondholders of the Manchester & Keene Railroad, to take possession of the railroad under the provisions of the mortgage for default of the interest, and to operate the same, and take the earnings thereof for the benefit of the bondholders, and what reply you made to such request, if any?

45 A. On or before Oct. 24, 1881, I, as trustee, or rather the three trustees, Lane, White, and myself, were applied to by Francis A. Brooks, as attorney for the bondholders under said mortgage, to take measures for enforeing the mortgage remedies in behalf of the bondholders of the Manchester & Keene Railroad. I consulted with Mr. White, one of my co-trustees, but not with Mr. Lane, as he had resigned previously, and then we notified Mr. Brooks that we declined to take any such action as he requested.

Int. 9. Was this notification in writing or oral, & if in writing will you furnish a copy of the same, and make it a part of your answer to this interrogatory.

A. It was in writing. I will annex hereto a copy of the same to be marked Exhibit "C," W. H. H., No. 178, July 19, 1883.

Int. 10. State your reasons for the refusal of Mr. Brooks' request.

A. It was in consequence of the action of the judges of the court as to our removal. I have no doubt that the interest on the bonds was overdue and in default, & had it not been for the action of the judges, as before described, no doubt we should have acceded to his request for us to take possession of the road.

CORNELIUS V. DEARBORN.

46 *Deposition of J. Wilson White.*

J. WILSON WHITE, of Nashua, in the district of New Hampshire, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by F. A. BROOKS, Esq., as follows, to wit:

Int. 1. Please state if you are one of the trustees under the mortgage of the Manchester and Keene R. R., a copy of which is produced and annexed to the deposition of C. V. Dearborn, just taken in this case?

A. I am.

Int. 2. You have heard the testimony just given in this case by C. V. Dearborn, your co-trustee; whether or not is the same, so far as the subject-matter thereof is known to you, such testimony as you would yourself give if examined fully in relation thereto, and if so, will you adopt such parts of said evidence as your own testimony in this case?

A. Everything Mr. Dearborn has testified to, except what took place at Old Orchard Beach, where I was not present, is known to me to be correct, and if examined specifically I should make
47 the same answers to the questions which Mr. Dearborn has made, and am willing to, adopt the same, with the exception above referred to, as my own evidence. I mean, so far as the facts are concerned, and in regard to the views or opinions expressed by Mr. Dearborn in his testimony, I entertain the same views and opinions as he has expressed.

J. W. WHITE.

Sworn to and subscribed before me, July 19, 1883.

WILLIAM H. HACKETT,
Spec. Examiner.

Deposition of William Shepard.

I, WILLIAM SHEPARD, of Lowell, Mass., having been first duly sworn, depose and say, in answer to interrogatories proposed by F. A. BROOKS, Esq., of counsel for the complainant, as follows:

Int. 1. Please give your age, residence, and occupation.

48 A. Age, 57; I live in Lowell, Mass., & am a stockbroker.

Int. 2. Are you one of the plaintiffs in the case, Alexander Bruce and others *vs.* The Manchester & Keene Railroad and others, now pending in circuit court of U. S. for the district of New Hampsire?

A. I am; but I have noticed that I am called in the papers "John" Shepard; this is incorrect, my name is William.

Int. 3. If you became the owner of a bond issued by the Manchester & Keene Railroad, secured by a first mortgage of said railroad, state when you first became the owner of said bond, and its amount and description?

A. I did become the owner of such bond some time in the year 1879. In the absence of my books I am unable to fix the exact date. It was bond No. 84, for one thousand dollars, bearing on its back the certificate of Messrs. Lane, White, and Dearborn, trustees, that it was the first mortgage. I have it here, and produce it to be identified by the magistrate, & it is marked W. H. H., Ex.,

49 July 19, 1883, "A," Case No. 178. The number of the bond is 84, and was for $1,000. There are attached to said bond interest coupons, nine of which are now over due, for $30.00 each, numbered respectfully, 6, 7, 8, 9, 10, 11, 12, 13, & 14.

Int. 4. If you authorized the suit to be brought in your name with that of other parties for enforcing your rights as a bondholder under the mortgage of the Manchester & Keene Railroad at any time, please state that fact and when it was.

A. I requested to be associated with the parties who were commencing a suit for that purpose. This was shortly before the suit was commenced.

Int. 5. Whom did you authorize so to bring a suit?

A. I authorized Mr. F. A. Brookes, of Boston. I understood he was about beginning a suit for the other bondholders, and I wished to be joined as one of the parties.

WILLIAM SHEPARD.

Subscribed and sworn to before me, July 19, A. D. 1883.

WILLIAM H. HACKETT,
Special Examiner.

50 EXHIBIT A. No. 178. July 19, 1883.—W. H. H. Ex. referred to in Deposition of C. V. Dearborn.

Manchester & Keene R. R. Mortgage Bonds.

This indenture, made the twenty-ninth day of May, A. D. 1878, between the Manchester & Keene Railroad, a corporation existing under the laws of the State of New Hampshire, party of the first part, and

Farnum L. Lane, of the city of Keene, J. Wilson White and Cornelius V. Dearborn, of the city of Nashua, all of said State of New Hampshire, parties of the second part, witnesseth: That—

Whereas said party of the first part is a corporation duly organized under the provisions of an act of the Legislature of the State of New Hampshire, approved July 16, 1864, for the purpose of constructing, operating, and maintaing a railroad through the towns intermediate between Keene on the west and Goffstown or Manchester on the east; and

Whereas subscriptions for the capital stock of said railroad have already been made and paid, amounting to three hundred and fifty thousand dollars and upwards; and

Whereas said railroad corporation, by an act of said Legislature passed July 3, 1873, has been authorized to issue its bonds to an amount not exceeding in all eight hundred thousand dollars and not exceeding at any one time the amount received or paid in by way of subscriptions to the capital stock of said railroad, and has also been authorized to secure said bonds by a mortgage of said railroad; and

Whereas by vote of said corporation, passed May 17, 1876, the directors of said corporation were authorized to issue its bonds for the purpose of constructing said railroad, and to execute a good and sufficient mortgage of said railroad, the franchise and property thereof then in being or thereafter to be acquired, as security for its said bonds to trustees for the holders of said bonds and such persons as may become the holders of said bonds; and

Whereas the notes or bonds of said railroad dated July 1, 1876, and payable July 1, 1896, of the denominations and numbers respectfully as follows, viz:

Numbers 1 to 25, inclusive, of $200 each	$5,000 00
Numbers 1 to 20, inclusive, of 500 each	10,000 00
Numbers 1 to 45, inclusive, of 1,000 each	45,000 00
And amounting in all to	$60,000 00

Were duly executed, issued, and negotiated by said corporation to sundry persons, for value, and are now outstanding as debts of said corporation; and

Whereas an instrument, purporting to be a mortgage of said railroad, and dated September 19, A. D. 1876, and recorded with Cheshire county deeds in vol. 254, page 424, and with Hillsborough county deeds in vol 432, page 352, was executed for the purpose of securing the said notes or bonds; and

Whereas since the execution of said instrument of mortgage one of the persons named therein as trustee for said bondholders has deceased, and another of said trustees and mortgagees has resigned as said trustee, thus leaving two vacancies in the office of trustees under said instrument of mortgage, thereby rendering said deed of mortgage ineffectual as a means of raising such further sums of money as are necessary to insure the completion of said railroad; and

Whereas it is necessary that additional notes or bonds should be issued and negotiated, as contemplated in said act of July 3, 1873, to secure the construction and completion of said railroad; and

Whereas, under these circumstances, it has been deemed expedient and proper that a new instrument or deed of mortgage from said party of the first part to one of said former trustees and to two new trustees should be executed, the said new mortgage to embrace or secure not only the bonds hereinabove referred to as issued under the aforesaid instrument and now outstanding to the amount of $60,000, but also the additional bonds necessary, with stock subscriptions, to secure the construction and completion of said railroad; and

Whereas the said party of the first part has resolved now to issue its notes or bonds, dated July 1, 1876, and payable July 1, 1896, to the amount of $350,000, and to make further issues thereof from time to time to the amount of all stock subscriptions then actually made and paid, but not exceeding in all five hundred thousand dollars in amount; and said party of the first part has also placed its said notes or bonds to the amount of five hundred thousand dollars in the hands of said parties of the second part, to be used by said parties of the second part for retiring at par said bonds now outstanding, and for raising the necessary means of constructing and completing said railroad, subject, however, to the order and direction of said party of the first part, given by its president and treasurer, in writing, in regard to the negotiation or delivery of all such notes and bonds as shall not be required for retiring the said bonds now outstanding as aforesaid; and

Whereas said party of the first part, by vote of its board of directors, has authorized Theodore H. Wood, the president of said Manchester & Keene Railroad, in the name and behalf of said corporation, and for the purpose of securing the payment of its said notes and bonds as aforesaid, to execute and affix its corporate seal to this indenture and deliver the same to the said parties of the second part:

51 Now, therefore, this indenture witnesseth, that the said Manchester & Keene Railroad, in consideration of the premises, and of the agreement of the said parties of the second part for the faithful performance of their duty as trustees under this indenture, does hereby grant, bargain, sell, convey, transfer, and assign unto the said Farnum F. Lane, J. Wilson White, and Cornelius V. Dearborn, and the survivors or survivor of them, their successors and assigns, in trust for the benefit of all persons now being or hereafter becoming the owners and holders of said notes or bonds, all the real and personal property and franchises of every kind or description now belonging to said party of the first part or hereafter to be acquired by the same, including the railroad of said party of the first part as the same is now located, or may hereafter be located, beginning at a point in the main track of the Cheshire railroad in Keene 393 feet north 37° west from the northerly side of Water street; thence running easterly through the towns of Roxbury, Marlborough, Harrisville, Hancock, and Bennington, to Greenfield, in the county of Hillsborough, being six rods in width, together with all the rights and privileges under any extension of said rail-

road hereafter made in an easterly direction from said town of Greenfield toward Goffstown or Manchester; also all lands, roadbeds, stations, depot grounds, buildings, rights, and easements whatsoever now owned or hereafter to be acquired by said party of the first part; also all tracks, ties, rails, bridges, or structures whatsoever of said party of the first part; also all its rolling-stock, tools, implements, materials, and supplies, or such as shall hereafter be acquired by said party of the first part; also all the tolls, income, and profits derivable from said property and franchises, and the right to collect, receive, and recover the same.

To have and to hold the above described premises, franchises, property, rights, privileges, and appurtenances to the said parties of the second part, the survivors or survivor of them, their successors and assigns, forever, in trust, nevertheless, for the payment of the afore-described notes or bonds, amounting in all to $500,000, placed as aforesaid in the hands of said parties of the second part, or such of them as may hereafter be issued by said trustees upon the written requisition of the president and treasurer of said corporation, provided the amount of all bonds so issued shall not at any time exceed the subscriptions paid in on the capital stock of said party of the first part, the said notes or bonds so deposited with said trustees consisting of one hundred and twenty-five bonds of $200 each, numbered consecutively from 26 to 150, inclusive; of one hundred and sixty bonds of $500 each, numbered consecutively from 21 to 180, inclusive; of three hundred and ninety-five bonds of $1,000 each, numbered consecutively from 46 to 440, inclusive.

All said notes or bonds secured by this mortgage shall bear the endorsement or certificate of the parties of the second part, or of a majority of them, in the words following, to wit, "We hereby certify that this bond is one of the within described series of first mortgage bonds," and no others are secured by this mortgage; it being also understood and agreed by and between the parties hereto that all the notes or bonds of said party of the first part heretofore sold, issued, and negotiated for value, and now outstanding, which bear the indorsement or certificate of said Lane, Dort, and Colony, as trustees under said former instrument of mortgage, to the amount in all of $60,000, may be surrendered by the holders thereof to said parties of the second part, in exchange at par for a like amount of the notes or bonds of said party of the first part, indorsed or certified by the said Lane, White, and Dearborn, trustees under this instrument, or their successors, to be embraced or secured by the provisions of this indenture of mortgage; and in all cases of such exchange the old notes or bonds surrendered for exchange shall be cancelled and preserved by said parties of the second part, with a statement indorsed thereon, showing the numbers and denominations of the new bonds issued in exchange therefor.

And this indenture of mortgage or deed of trust is made upon the following conditions, covenants, and agreements, entered into by and between the parties thereto as follows, to wit:

Firstly. In case any vacancy or vacancies shall occur in the office of trustees under this instrument from any cause, or in case of the

incapacity of either of said parties of the second part from any cause to discharge his or their duty as such trustees, or of the refusal of either of them to act in the discharge of their said duty when requested so to do, then the other trustees, or trustee, if one only remained competent to act, may, and it shall be his or their duty, to supply or fill such vacancy or vacancies in said office by an appointment, in writing, indorsed upon this instrument, and to be recorded therewith, so that said office or trust shall at all times consist of three suitable persons capable of actively performing the duties of such trustees.

Secondly. In case any default or defaults in the payment of said notes or bonds, or the interest thereon, as it becomes payable, shall occur and continue at any time or times for a period of sixty days, it shall be lawful for said trustees, or any two of them, or their successors, to take possession of the said railroad and property herein conveyed, and said trustees, or any two of them, shall thereupon have full power and authority to operate said railroad as fully as said corporation itself might operate the same, and to receive the earnings thereof, and, after providing and paying all expenses of working and operating said railroad, and keeping the same in condition safe and suitable for business, and paying all expenses and charges whatsoever necessary and proper to enable them to retain, manage, and control said property, or discharge any taxes or liens thereon, to apply the balance or net proceeds to the purposes of this trust. And in case any such default or breach of condition shall continue at any time for a period of six months, and the holders of a majority of said notes or bonds outstanding shall, in writing, so request of said trustees, the said trustees are authorized and empowered to determine and declare the principal of said notes or bonds to be payable on demand, and thereupon said principal shall become payable forthwith, and to make demand upon said corporation for payment of the same, with all interest due thereon; and in case said corporation shall fail to pay said notes or bonds, both principal and interest, within ten days after such demand, then the said trustees, their successors or assigns, are hereby authorized and empowered, as the attorneys of said corporation, to offer said railroad and all the property and franchises of said corporation for sale to the highest bidder at public auction, and, upon such sale, to make, execute, and deliver to the purchaser or purchasers a good and sufficient deed thereof, either as the attorneys of the said party of the first part or under their own hands and seals; provided, however, that at least one month's notice of such intended sale shall be given by publishing an advertisement thereof in one newspaper at least published in each of the counties of Cheshire and Hillsborough, and in one newspaper published in the city of Boston, Massachusetts, and such sale or sales may be notified and held as often as any breach of condition of this indenture shall occur until such sale and conveyance shall be actually and effectually made and completed.

52 And said trustees or their successors may become the purchasers at such sale for the benefit of the holders of said notes

or bonds, and in this event the said corporation shall release to them all its rights, title, and interest in said railroad and property herein conveyed, and said trustees, or their successors, may thereafter continue to hold, operate, and manage said railroad and railroad property for the benefit of the holders of said notes or bonds as fully and effectually as if no such sale had been made, or as if the said trustees had themselves been the original grantees and owners of said railroad franchises and property; and said trustees shall in no event be responsible for the default, misconduct, or neglect of each other, but only for their own default, neglect, or misconduct; and said trustees are hereby authorized in the exercise of the foregoing power to employ such agents, superintendents, and servants as they may deem expedient and proper, and to make all such expenditures or outlay by way of repair and otherwise as they may think necessary, and to defray the same from the gross receipts or earnings of said railroad, and any sale and conveyance made as aforesaid of said railroad and property shall be a perpetual bar both in law and equity against said party of the first part, and any others claiming said premises, property, or franchises, or any part thereof, from or under said party of the first part under any title arising subsequently to the date of these presents.

And said trustees shall be entitled to have and receive from the earnings of said railroad, or in case of sale from the proceeds of sale thereof, suitable and proper compensation for their own services in the premises, and to be reimbursed for all expenses and payments incurred by them in the discharge of the duties of their office, and for all other expenses, advances, or liabilities made or incurred by them in operating or maintaining said railroad or managing the same, and for placing and preserving the same in a condition suitable for business at all times, including the discharge of any taxes or liens thereon paramount to the notes or bonds hereby secured; and said trustees shall be liable or accountable to the holders of said notes or bonds for such sums only as shall remain in their hands or possession after meeting and defraying all the expenses and charges hereinabove authorized or rendered necessary in the proper discharge of their duties by said trustees, and the said trustees or their successors are hereby made the attorneys in fact of the said party of the first part, with authority to do all acts and things whatsoever in its name and behalf necessary or proper for giving effect to, executing, or carrying out the powers hereinabove granted, or any of them. And the said trustees, after entering upon said railroad or taking possession thereof at any time under the aforesaid provisions, may, in lieu of operating said railroad themselves, lease or grant the same to others and contract with others for operating the same on such terms and conditions as they may deem best.

And said parties of the second part hereby accept the above-described trusts and covenant and agree to and with the said party of the first part (each one for himself alone) that they will well and truly execute the said trusts and faithfully discharge the duties thereby imposed on them.

Provided, nevertheless, and this conveyance is made upon the ex-

press condition, that if said party of the first part shall well and truly pay without default to the holders thereof each and every of the bonds and coupons hereby secured or intended to be secured, after the same shall have been duly issued at the time and in the manner in said bonds and coupons provided, and shall keep and perform all its covenants and agreements herein contained, then and from thenceforth this indenture and the estate hereby granted shall cease, determine, and become void; otherwise remain in full force and effect; but it is understood and agreed that this conveyance shall forthwith become absolute and irredeemable in case said party of the first part shall fail to preserve its organization or its charter rights.

In testimony whereof, the said Manchester and Keene Railroad, in pursuance of a resolution of its board of directors authorizing the same, has caused its corporate seal to be hereto affixed, and these presents to be subscribed by its president, for that purpose duly authorized, and said parties of the second part have hereto set their hands and seals the day and year first above written.

All interlineations and erasures in the foregoing instrument made before execution hereof.

MANCHESTER & KEENE RAILROAD,
By THEODORE H. WOOD, [SEAL.]
President.

In presence of—
CHARLES H. COLLINS.
J. M. HOPKINS.

F. F. LANE, [L. S.]
J. W. WHITE, [L. S.]
C. V. DEARBORN, [L. S.]
Trustees.

In presence of—
F. A. EATON.
P. A. HAMMOND.

STATE OF NEW HAMPSHIRE, *Hillsborough,* } ss:

JUNE 10TH, 1878.

Then personally appeared the above-named Theodore H. Wood, president of the Manchester & Keene Railroad, and on its behalf, as authorized for this purpose, duly acknowledged the foregoing instrument to be the free act and deed of said railroad corporation.

Before me— GEO. Y. SAWYER,
Justice of the Peace.

At a meeting of the directors of the Manchester & Keene Railroad, held at Nashua, N. H., May 29th, 1878, a legal quorum being present, it was voted: "That Theodore H. Wood, the president of this corporation, be, and he hereby is, authorized, in the name and behalf of this corporation, to execute the mortgage or deed of trust of the Manchester & Keene Railroad in favor of Farnum F. Lane, J. Wilson White, and Cornelius V. Dearborn, as trustees, bearing date May 29th, 1878, and to affix thereto the seal of this corporation, a

copy of which mortgage or deed of trust is herewith filed to be recorded at length by the clerk; and the said mortgage or deed of trust, when so executed, is hereby adopted by this corporation as its deed. And the said president is authorized to do and perform all other acts in the name of this corporation necessary for giving legal effect to the same in any way."

A true copy of record.

Attest: THOS. E. HATCH,
Clerk of the Board of Directors of the Manchester & Keene Railroad.

Keene, N. H., June 7, 1878.

53 EXHIBIT B.—In Deposition of C. V. Dearborn.

AUG. 10, '80.

An order will be made as soon as may be removing all the trustees, & appointing Gov. Weston, Ramsdell, & Jno. Kimball, of Concord, in their places, as trustees, under the mortgage, and under the order of July 27, 1880.

C. DOE.

(Addressed:) Mr. F. A. BROOKS, WM. W. BAILEY, & WM. E. CHANDLER, *Ocean House.*

EXHIBIT C.—Referred to in Deposition of C. V. Dearborn.

NASHUA, *Oct.* 24, 1881.

F. A. BROOKS, *Att'y, &c., for Bondholders of M. & K. R. R.*

DEAR SIR: Your communication of Oct. 21st, relating to Manchester & Keene R. R., and requesting Lane, White, and myself to act, &c., is received. I have conferred with Mr. White on the subject, and we agree that we must decline to take any action
54 whatever in the interest of the bondholders under the circumstances of the case, which you fully understand.

As Mr. Lane was forced to send in his resignation as trustee under the mortgage, we do not deem it necessary to consult him in the matter.

Very truly, yours, (S'g'd) C. V. DEARBORN.

And afterwards, to wit, on the 11th day of Oct., A. D. 1883, came the Manchester & Keene R. R., by its solicitor, William L. Foster, in said cause, and filed the instrument, of which the following is a copy:

55 Circuit Court of the United States, District of New Hampshire. Oct. Term, 1883. In Equity.

ALEXANDER BRUCE & *al.*
v.
THE MANCHESTER AND KEENE R. R. & *al.*

The plea of the said Manchester & Keene Railroad, James A. Weston, George A. Ramsdell, & John Kimball, defendants:

These defendants, by protestation, not confessing or acknowledging the matters & things in & by said bill set forth & alleged to be true in such manner & form as the same are thereby & therein set forth & alleged, for plea to said bill, and to so much & such parts thereof as prays that an account may be taken of what is alleged to be due, owing, & payable to the orators & other holders of notes or bonds secured by said mortgage of May 27, 1878, and that the said Manchester & Keene Railroad may be ordered to pay & satisfy the same, together with the costs of this suit, and that in default thereof
56 the said Lane, White, and Dearborn, as trustees under said mortgage, or such other persons, if any, who may or shall have succeeded to the office of trustees under said deed of trust, in pursuance of the terms of said deed of trust, in the place & stead of said Lane, White, and Dearborn by lawful right, may be required by order of the court to take possession of said Manchester & Keene Railroad & of all property embraced in said mortgage, & either operate the same personally or take the earnings thereof, or else to lease said railroad to be operated by others at a rental for the benefit of said bondholders, as is provided in & by said deed of trust; and that the said Hale, Colony, Frye, & Scruton, & Campbell, and any other person who may or shall become the pretended purchaser or purchasers of said railroad at said pretended sale, may be restrained by order of this court from resisting the said Lane, White, & Dearborn in the discharge of their duties under said mortgage pursuant to the directions of this court, say: That on the 22d day of
57 April, 1880, the said Hale, Colony, Frye, and Scruton exhibited their bill of complaint in the supreme court of the State of New Hampshire against the Nashua & Lowell railroad, the Manchester & Keene Railroad, and the said White & Dearborn, to which suit said Lane was subsequently made a party defendant, wherein they prayed, among other things, that the said mortgages might be foreclosed; that subsequently, after one notice to appearance by and hearing of all said defendants, the said supreme court made an order authorizing the said Lane, White, & Dearborn to take possession of and operate the said railroad as trustees; that on the 18th day of August, 1880, the said Lane, having resigned & declined said trust, the said supreme court removed the said White & Dearborn from said trust, and appointed as trustees in the
58 place of said Lane, White & Dearborn, James A. Weston, George A. Ramsdell, & John Kimball; that subsequently the said bill so pending in said supreme court was amended by leave and order of said court, so as to make & constitute the same a proceeding in behalf of all the bondholders under said mortgage who should choose to join therein; that many such bondholders came in & joined in the prosecution of said bill, among them the Nashua & Lowell railroad, by Francis A. Brooks, its attorney, who filed in said court a paper making the said Nashua & Lowell railroad a party plaintiff to said bill; that replications were duly filed and the cause came on for trial at the September trial term of said supreme court, and the same was heard and tried and questions of law arising upon

said trial were reserved by the presiding judge for the consider-
59 ation of the full bench of said supreme court; that at the March term of said court, 1881, the said court rendered a decision in favor of the plaintiff in said bill, and the cause was remanded to the trial term of said supreme court for decrees in accordance with said decision of the full bench; that at the May (trial) term of said court, 1881, it was ordered, among other things, that the appointment of said Weston, Ramsdell, and Kimball, as trustees as aforesaid, be confirmed, and that said trustees be made parties to said bill; that a list of bondholders under said mortgage be prepared, and that a meeting of said bondholders be held if the bondholders should desire the same for the election of trustees; that a default and breach of the conditions of said mortgage be adjudged to have taken place, and that foreclosure thereof be made by sale of the said railroad, its property & franchises, at auction;
60 that notice be given by publication for the presentation by the bondholders of their bonds on or before Aug. 5, 1881, with a view to a meeting — the bondholders for the election of trustees; that at the September court, 1881, an order was made by said court allowing a bondholders' meeting for the purpose aforesaid, & providing & decreeing that after such meeting the trustees elected thereat might foreclose said mortgage by sale of said road, its property & franchises and that if no such bondholders' meeting should be holden within ten days, the trustees appointed as aforesaid under the said order of said court August 10, 1880, might proceed to foreclose said mortgage by sale as aforesaid; that subsequently, during the said September term of said supreme court, to wit, on the 22d of November, 1881, the said trustees made their report to said
61 court that a sale of said road, its property & franchises, had been made under the order & authority aforesaid, and thereupon all the proceedings of the said trustees were by said supreme court ratified & confirmed, and the sale by them of the said Manchester & Keene Railroad, its property & franchises, was approved, ratified, & confirmed by the judgment and decree of said supreme court; that to such order, judgment, & decree the said Manchester & Keene Railroad, and also the said Nashua & Lowell railroad, by the said Francis A. Brooks, its attorney, excepted; that said exceptions came on for a hearing before said supreme court at a session of the full bench thereof at the December term of said court, 1881, and were by said court heard & considered, and at the March term of said court, 1882, by the final order, decree, & judgment of said supreme court, the said exceptions were overruled.

62 And these defendants aver that, by the aforesaid suit and proceedings in the said supreme court, said supreme court obtained full and lawful jurisdiction of said Manchester & Keene Railroad, its property & franchises, & of the foreclosure of the mortgage thereof; that said jurisdiction cannot be taken away, & concurrent or — jurisdiction assumed in proceeding in behalf of any holders of bonds, either in this circuit court or elsewhere, but all such bondholders and these plaintiffs are bound by the said orders, decrees, &

judgment of the said supreme court finally & conclusively adjudicated.

All which matters and things these defendants aver & plead in bar to said plaintiff bill, & pray the judgement of this honorable court whether they should make any further answer to said bill, & pray to be hence dismissed, with their costs and charges in this behalf sustained.

THE MANCHESTER & KEENE RAILROAD,
By WM. L. FOSTER, *Its Solicitor.*
GEORGE A. RAMSDELL,
JOHN KIMBALL,
JAMES A. WESTON, *As Trustees as aforesaid,*
By L. N. BELL, *Their Solicitor.*

63 I, George A. Ramsdell, one of the defendants in the above-named suit of Alexander Bruce & *a. v.* The Manchester & Keene Railroad, on oath, say: That the foregoing plea of the said defendants is true in point of fact, & is not interposed for delay.

GEO. A. RAMSDELL.

U. S. OF AMERICA, *Dist. of N. H.:*

DEC. 15, 1883.

Subscribed & sworn to before me—

WM. L. FOSTER,
U. S. Commissioner.

I, John Kimball, one of the defendants named in the foregoing plea, on oath, say: That the same is true in point of fact, and that it is not interposed for delay.

JOHN KIMBALL.

UNITED STATES OF AMERICA, } *ss:*
Dist. of N. H., }

DEC'R 18, 1883.

Subscribed and sworn to before—

WM. L. FOSTER,
U. S. Commissioner.

64 And afterwards, on the 18th day of Oct., 1883, the plaintiffs filed their motion in said suit in the words following, viz:

Circuit Court of the United States, District of New Hampshire. Oct. T., 1883. In Equity.

ALEXANDER BRUCE & *als.*

v.

MANCHESTER & KEENE RAILROAD & *als.*

And now the complainants come and move that the plea of the said Manchester & Keene Railroad and of Weston, Ramsdell, and Kimball to the bill of complaint filed Oct. 11th, 1883, be stricken out—

Because the said defendants before filing their said plea had an-

swered the said bill of complaint, and replications had been duly filed to said answers by the complainants, and the said parties were already at issue upon such answers and replications.

Also because the said plea was not accompanied by the affidavits and certificates provided for by rule 31 of the courts of equity of the United States.

By their solicitor: F. A. BROOKS.

65 And at the October term of said court, A. D. 1883, the parties filed their stipulations in the words following, to wit:

U. S. Circuit Court for the District of New Hampshire. Oct. Term, 1883. In Equity.

ALEXANDER BRUCE & *al.*

vs.

MANCHESTER & KEENE RAILROAD & *als.*

The bill of complaint in this case may be dismissed as to the defendants, Samuel W. Hale and Henry Colony, and all further proceedings in said suit against them discontinued.

BRIGGS & HUSE,
Solicitor for Hale & Colony.
F. A. BROOKS,
Solicitor for Complainants in said Suit.

66 United States Circuit Court, District of New Hampshire. In Equity.

ALEXANDER BRUCE & *al.*

v.

MANCHESTER & KEENE RAILROAD & *als.*

The bill in the above-entitled case may be dismissed as against James A. Weston, George A. Ramsdell, and John Kimball without costs.

F. A. BROOKS,
Solicitor for Complainant.
S. N. BELL,
Solicitor for James A. Weston, George A. Ramsdell, & John Kimball.

And at the October term of said court, A. D. 1883, viz., on the — day of ——, the complainants came and filed their discontinuance of said suit as against Jeremiah W. White, Cornelius V. Dearborn, and Farnum F. Lane in the words following, to wit:

67 U. S. Circuit Court, District of New Hampshire. October Term, A. D. 1883. In Equity.

ALEXANDER BRUCE & *al.*

vs.

MANCHESTER & KEENE RAILROAD & *als.*

And now this suit having already been discontinued as to all the

defendants excepting the Manchester & Keene Railroad and Jeremiah W. White, Cornelius V. Dearborn, and Farnum F. Lane, and the said White, Dearborn, and Lane having been originally joined as nominal defendants in the bill of complaint, seeking no relief against them or either of them, and they not having appeared or answered to said bill, and not having been required to do so:

The complainants come and now discontinue or dismiss their said bill as against the said White, Dearborn, and Lane, the object of such discontinuance being to simplify the case and eliminate therefrom all parties defendant except the Manchester & Keene Railroad before the same is taken by appeal to the Supreme Court of the United States.

By their solicitor: A. S. HALL.

68 And afterwards, viz., on the 18th day of Dec., A. D. 1883, the said suit came on to be heard before the Hon. Daniel Clark, the complainants being represented by their solicitor, F. A. Brooks, and the Manchester & Keene Railroad by its solicitor, William L. Foster.

And thereupon the said defendant produced as a witness George A. Ramsdell, the clerk of the supreme court of New Hampshire, for the county of Hillsboro', and requested that he be sworn and allowed to testify *viva voce* in regard to the records of the State court aforesaid, relating to the suit of Samuel W. Hale *et al. v.* The Nashua & Lowell R. Co., referred to in the answer of the said defendant.

The complainants objected to this testimony; the objections were overruled, and the witness was allowed to testify, and did testify, but his testimony was given *viva voce*, and not taken in writing or made a matter of record, or preserved in any way, and no
69 other evidence was taken or offered in behalf of the defendant, and the said cause was argued by counsel.

And thereupon, upon consideration thereof, it was, on the fifth day of January, A. D. 1884, ordered, adjudged, and decreed by the court that the complainants' bill be dismissed.

And on the 28th day of March, A. D. 1884, the complainants came into court and filed their appeal in the words following, to wit:

70 U. S. Circuit Court, District of New Hampshire. October Term, 1883. In Equity.

ALEX. BRUCE *& al.*

vs.

MANCHESTER & KEENE RAILROAD.

And now the bill of complaint in this case having been already discontinued or dismissed as against all defendants, except the Manchester & Keene Railroad, by the act of the parties, and a decree having been made by the court for the dismissal of the said bill as to the Manchester & Keene Railroad also, the complainants' appeal from the said decree of dismissal.

By their solicitor: F. A. BROOKS.

And the complainants furnished the appeal bond, a copy of which, with the approval of the circuit judge, is as follows:

71 Know all men by these presents, that we, Cornelius V. Dearborn and Jeremiah W. White, both of the city of Nashua, in the State of New Hampshire, are held and firmly bound unto the Manchester and Keene Railroad, a corporation existing by the laws of the State of New Hamphire, in the full and just sum of five hundred dollars, to be paid to the said corporation, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a term of the circuit court of the United States for the district of New Hampshire, begun on the eight- day of October, A. D. 1883, in a suit in equity depending in said court between Alexander Bruce and another as plaintiffs and the said Man-

72 chester & Keene Railroad as defendant, a decree was rendered against the said Alexander Bruce and another, dismissing their bill, and the said plaintiffs at the same term of said court having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit:

Now the condition of the above obligation is such that if the said plaintiffs shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed, and delivered in presence of—
JAMES E. PRICHARD.

C. V. DEARBORN. [L. S.]
J. W. WHITE. [L. S.]

Approved:
JOHN LOWELL, *Circuit J.*

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of ——

Attest: WILLIAM H. HACKETT,
Clerk U. S. C. C., Mass. Dist.

73 UNITED STATES OF AMERICA, *District of Massachusetts:*

William H. Hackett, clerk of the circuit court of the United States for the first circuit and dist. of New Hampshire, certify that the foregoing is a true copy of the record and of all proceedings in the cause of Alexander Bruce and others against the Manchester and Keene Railroad, in this court determined.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court at Portsmouth, in said district, this first day of October, in the year of our Lord one thousand eight hundred

and eighty-four, and of the independence of the United States the one hundred and ninth.

[SEAL.] WILLIAM H. HACKETT, *Clerk.*

74 The following is a copy of the opinion in accordance with which the decree was entered dismissing the bill of complaint in the cause of Alexander Bruce & *als. v.* Manchester & Keene Railroad:

Circuit Court of the United States, New Hampshire Dist.

FIRST JUDICIAL DIST., *88:*

BRUCE *et als. v.* MANCHESTER & KEENE R. R. *et al.*

CLARK, J.:

The Manchester & Keene Railroad was incorporated by the Legislature of New Hampshire July 16, 1864.

On the 29th of May, 1878, it issued its bonds to the amount of $500,000, bearing date July 1, 1876, & payable July 1, 1896, with six per cent. interest semi-annually.

To secure the payment & interest of these bonds it mortgaged its road and franchises and all the property connected there-
75 with to Cornelius V. Dearborn, J. Wilson White, & Farnum F. Lane, trustees.

By this mortgage it was stipulated that if said railroad failed for a period of six months to pay the interest of said bonds, upon a request of a majority of the holders, the trustees might declare the principal of the bonds to be payable forthwith, and make demand therefor and for arrears of interest; and upon failure of payment of the same within ten days after demand might sell the railroad, property, & franchises by public auction, and make due conveyance of the same. The railroad made default in the payment of its interest, and on the 29th day of April, 1880, Samuel W. Hale, Henry Colony, John Y. Scruton and Wm. P. Frye filed a bill of complaint in equity in the supreme court of New Hampshire against the Lowell & Nashua Railroad, the Manchester & Keene Railroad, and Dearborn, White, & Lane, trustees.

The bill alleged that the complainants were bondholders
76 of the Manchester & Keene road, and among other things, that by reason of the want of care and proper management of the directors and trustees, the interest of said bonds had become overdue and had been unpaid for more than two years, tho' demanded, and the road itself was unused, neglected, and rapidly going to ruin.

It prayed, among other things, that a receiver might be appointed for the protection and preservation of the road; that two of the trustees, Dearborn & White, might be removed and others appointed in their places, and that a foreclosure of the mortgage might be made.

Of this bill of complaint the supreme court of New Hampshire took immediate cognizance, and appointed a receiver to take possession of the road.

On the 18th day of Aug. thereafter it removed two of the trustees, Dearborn & White, and appointed James A. Weston, George A. Ramsdell, and John Kimball in their places and that of
77 Lane, who had resigned, and they afterwards became parties to the bill.

The bill was then amended so as to allow other bondholders to come in and constitute the same a proceeding of all the bondholders, who should desire to become parties thereto, and they did so come in, among others the Nashua & Lowell road, which had been made party defendant in the bill.

At the Sept. trial term of the court, 1880, a hearing was had upon the bill and the pleadings connected therewith, and certain questions of law were reserved and transferred to the full bench of the supreme court.

These questions were heard at the March term of the court, 1881, decided, and the cause remanded for a decree in accordance therewith, and at the May trial term next following a default and breach of the condition was adjudged to have taken place, and a decree entered that a foreclosure be made by a sale at auction of the
78 road, its franchises, and property, and that notice be given by publication for the presentation by the bondholders of their bonds before Aug. 5th, 1881.

At the Sept. term, Sept. 2d, 1881, an order was made allowing the bondholders to hold a meeting for the choice of trustees if they desire, and that if no such meeting was held within ten days the trustees, which had been appointed by the court, should proceed to foreclose the mortgage by a sale, according to the decree of the court at the preceeding May term.

No such meeting of the bondholders was held, and on the 21st day of Sept., 1881, in accordance with the order of the court, the trustees advertised said road, its franchises and property, for sale at public action Wednesday, Oct. 26th, at 12 o'clock noon, at which time the property was sold, subject to the result in this suit. Nov. 21st the trustees made report of the sale of the court, and the sale was ratified and approved.

79 On the 24th of Oct., 1881, two days before the sale of the road, under the order of the court, was to take place, and with full knowledge of the proceedings in the supreme court of New Hampshire, either by themselves or their attorney, the complainant in this case filed their bill against all the parties complainant in the New Hampshire court, and Charles H. Campbell, who was advertised as auctioneer to sell the road, alleging that they were bondholders of said road; that the road was in default of the payment of its interest and the conditions of the mortgage, and asking this court to order an account to be taken of what is due and owing to all the holders of said bonds, secured by ths mortgage of May 29th, 1878, and now payable, and that said Manchester & Keene road may be ordered to pay and satisfy the same at some short day, to be fixed by the court, together with the costs of suit, and in default thereof that the said Lane, White, and Dearborn, as trustees under
80 *under* said mortgage, or that such other persons, if any there be, who may or shall have succeeded to the office of trustees,

under said deed of trust, in pursuance of the terms of said deed, in the place and stead of said Lane, White, and Dearborn, by lawful right may be required by order of this court to take possession of said Manchester & Keene Railroad, and of all property embraced in said mortgage, and either to operate the same personally, and to take the earnings thereof, or else to lease said railroad to be operated by others at a rental, for the benefit of said bondholders as is provided in and by said deed of trust, and that said Hale and Colony and Frye and Scruton and Campbell and any other person or persons who may become the pretended purchasers of said railroad at said pretended sale, may be restricted from resisting the said Lane, White, and Dearborn in discharge of their duties under said mortgage, pursuant to the order of this court.

81 To this bill of complaint the Manchester & Keene Railroad has made answer, setting forth the proceeding of the supreme court of New Hampshire, its order and decree in relation thereto, the sale of the road, and the foreclosure of the mortgage.

Other parties defendant have made answer, but has no relief is claimed against them, their answers are not material to the decision in this case.

The Boston & Lowell railroad have withdrawn as complainants, and the remaining complainants make no denial or question of the jurisdiction of the supreme court of New Hampshire in the premises.

The question then comes distinctly, whether upon the bill and answer, as thus stated, this court should grant the relief prayed for, and the answer must be that it should not.

The subject-matter of the two suits—the one in the New Hampshire supreme court and the one in this court—is substan-

82 tially the same. The Manchester & Keene Railroad and its default in the payment of the interest on its bonds secured by the mortgage, 29th ——, 1878, and the relief of its bondholders.

The relief asked was somewhat different, but the subject-matter the same.

Over this matter the two courts have concurrent jurisdiction, and the rule has been established by a long line of almost unbroken decisions, that in all cases of concurrent jurisdiction the court which first has possession of the subject-matter must decide it.

Chief Justice Marshall thus announced the rule in Smith *vs.* Mc——, 9 Wheaton, 532, and it has been followed in many cases since.

Matlet *vs.* Dexter, 1st Cust., 178.
The Rob't Fulton, 1st Paine, 621.
Ex parte Robinson, 6th McL., 355.
Board of F. Missions *v.* McMastens, 4th Am. L. R., 526.
Ex parte Lefford, 5th Am. L. R., 659.
Parsons *vs.* Lyman, 1st Bl. C. C., 170.

83 United States *v.* Wells, 20th Am. L. R., 424.
Crane *vs.* McCoy, 1 Burd, 170.
Blake *v.* Railroad, 6 Bk't Reg., 330.
Levi *vs.* Life Ins. C., 1st Fed. Rep., 206.
Henrietta *et al. vs.* Christian *et al.*, 6 *Ib.*, 339.

Ins. Co. *vs.* University of Ch'g., 6 *Ib.*, 443.
Walker *v.* Flint, 7 *Ib.*, 435.
Wire Co. *v.* Wheeler, 11 *Ib.*, 206.
Ins. Co. *v.* Railroad, 13 *Ib.*, 857.
The J. W. French, 13 *Ib.*, 916.
Starct *vs.* Lye, U. S. Reps., 103 *Ib.*, 66.

The jurisdiction of the supreme court of New Hampshire first attached, and it had the right to proceed to the final determination of the cause to the exclusion of this court upon the same subject-matter.

In Peck *et al. vs.* Jenness *et al.*, 7 Howard, 612, Mr. Justice Grier, delivering the opinion of the court, says: It is a doctrine too long established to require a citation of authorities that where a court has jurisdiction it has a right to decide every question which
84 occurs in the cause, whether its decision be correct or otherwise; its judgment, till reversed, is regarded as binding in every other court, and that when the jurisdiction of a court and the right of the pl'ff to prosecute his suit in it having once attached, that right cannot be arrested or taken away by proceedings in another court.

This rule, says the court, is founded "not only in comity, but in necessity. If one could adjudge and the other reverse, the contest might go on until parties tired, justice was delayed, and the courts were in contempt."

Again, when the bill of complaint was filed in this case the Manchester & Keene road was in the hands of a receiver appointed by the supreme court of New Hampshire. The possession of that receiver was the possession of that court, and this court could not divest or disturb that possession, as it must do, if it granted the relief prayed for.

Taylor *et al. vs.* Carryl, 20 How'd, 583.
Hagen, in error, *v.* Gucas, 10 Pet., 172.
85 Freeman *v.* Howe, 24 How'd, 450.
Buck *v.* Colbath, 3 Wall., 334.
Walker *v.* Flint *et al.*, 7 Fed. R., 435.

It is contended by the complainants that the sale of the road by the trustees under the order of the court of New Hampshire was made subject to the result in this suit, and therefore the relief prayed for should be granted, but that contention cannot be assented to.

The decree of the court of New Hampshire was absolute and without condition that a foreclosure of the mortgage should be made by a sale of the road.

That decree this court cannot reverse or set aside, as it practically must do if it now grants the relief prayed for by the complainants.

The court of New Hampshire ordered the trustees to sell the road. This court is asked to order the trustees to run or lease the road for the benefit of the complainant. The one is inconsistent with
86 the other. The sale of the road was operative to foreclose the mortgage and transfer the road to the purchaser divested

of that incumbrance, and, if so, this court cannot trust the mortgage as still subsisting, and take the road out of the possession of the purchaser, or of its present owner. An objection was made at the hearing that the original records of the court of New Hampshire, produced by the clerk, were not competent evidence; that copies should have been produced. This objection the court overruled.

Copies of record are admitted from necessity, because the originals cannot be produced. The originals are the best evidence, and the admission of copies does not exclude the originals when they can be produced.

In Cate *vs.* Nutter, 24th N. H. Rep., it was held that where a copy of a record is admissible in evidence the record itself is equally admissible.

87 So in Jones *vs.* French, 22d N. H., 64. The papers admitted as evidence were not an extended record; none had been made but various orders and decrees of the court, and in such case, in proceedings in equity, the original papers and docket entries were deemed the record.

U. S. Bank *v.* Benning 4 Cr. C. C., 81. On consideration the ruling of the court was correct, and the bill in this should be dismissed.

Endorsed on cover: New Hampshire C. C. U. S. No. 1163. Alexander Bruce *et al.*, appellants, *vs.* The Manchester & Keene Railroad. Filed 23rd October, 1884.

117-54

Office Supreme Court U. S.
FILED.
MAR 20 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885. No. 759.

ALEXANDER BRUCE ET AL., APPELLANTS,
vs.
THE MANCHESTER AND KEENE RAILROAD.

BRIEF FOR APPELLANTS ON MOTION OF DEFENDANT TO DISMISS.

FACTS.

The bill in this case was originally brought by, or in the name of, three persons as complainants, to wit: Bruce, Shepard, and the Boston and Lowell Railroad corporation, "in behalf of themselves and all other like creditors" of the defendant corporation, holding bonds secured by mortgage on the railroad of the defendant company.

It is alleged in the bill (record p. 2 near bottom) "that the orators are respectively the owners and holders of said notes or bonds amounting in the aggregate to $90,000 of principal," upon which $90,000 of bonds there is now overdue and unpaid interest to the amount of $20,000, and that the interest is overdue and wholly unpaid on the entire issue of said mortgage bonds, amounting in all to $500,000.

The bill then proceeds to state that the orators had applied to the trustees named in said mortgage and had requested them to take measures for obtaining or realizing the interest in arrear upon the entire issue of said bonds, either by taking possession of and operating said railroad, or by leasing the

same to others at a rental to be used in meeting or paying said bonds and interest as provided in said mortgage or deed of trust; that the said trustees had, in breach of their duty to the orators, declined and refused to take such proceedings, and had thereby enabled the orators to pursue these remedies by a suit in their own name for that purpose, in behalf not only of themselves but of all other bondholders as well. (Record, p. 3, top).

Upon that theory the orators brought their bill for the benefit of themselves and all other bondholders, making the delinquent trustees defendants to the same, not merely to procure a decree for the amount of their overdue coupons, as is supposed by the counsel making this motion, but to enforce the liens upon the railroad property and its income or earnings established by the mortgage.

Sundry other persons were also joined with the defendant upon the allegation that they were seeking to effect a sale of said railroad to satisfy an alleged lien thereon prior to said mortgage lien, held or owned by themselves by means of proceedings then pending in the State Court of New Hampshire.

The object of the bill was twofold.

First: To enable the plaintiff bondholders to reach and hold the railroad and its earnings chargeable with the debt under the provisions of the mortgage or deed of trust;

Second: To procure the lien of this mortgage to be set up and established as prior in right to another alleged lien then being prosecuted by some of the defendants in a suit already pending in the State Court of New Hampshire.

It is quite true, as stated in the brief of defendants' counsel on this motion, after it had been set forth in the answer of the Manchester & Keene Railroad (Rec. p. 8, top) that the original trustees White, Dearborn, and Lane had been re-

moved, and new trustees appointed in their place by the State Court of New Hampshire, and after these original trustees had failed to appear or make any defence to the suit, that it was not deemed necessary longer to prosecute the suit against them and they were dropped by discontinuance.

It is also true, as stated in defendants' brief (Rec. p. 7, bottom), when it had been made to appear that the sale of the railroad under the alleged authority of the State Court had been in fact made, and made expressly subject "to *the result of the litigation arising upon the bill in equity, to which this answer is made*," that it was not then deemed necessary longer to prosecute this suit against the other defendants charged in the bill with combining to defraud the orators and mortgage bondholders by attempting to interpose a pretended lien held by themselves, and to give their pretended lien priority over the lien of the mortgage bondholders; hence these other defendants were dropped from the bill by discontinuance, without, however, effecting any other change in the character of the bill itself, or the remedy sought by it. It is also true that the Boston and Lowell Railroad Company, one of the orators in the bill, elected to withdraw from the suit, and did so on its own motion.

There still remained, however, the other two orators, who represented, certainly, their own bonds, and perhaps, also, the bonds of such other bondholders as might thereafter, at any time before final judgment, elect to come into said suit and participate in the benefit thereof, should the suit finally result in favor of the plaintiffs.

If the bill had been sustained by the circuit judge, instead of being dismissed by him, all the bondholders might have joined in the suit, and obtained the benefit thereof, and we do not understand that the right of such bondholders to come in hereafter and share the benefits of this suit (if any) were cut off by this decree of dismissal, if the same turns out to be appealable.

Where the decree is for defendant the amount in controversy is determined by the bill itself.

3 Peters, 33 Gordon *v.* Ogden.
2 How. 73 Knapp Banks.

II.

Suppose, however, we are entirely mistaken in the idea that the whole issue of the bonds is involved in the suit so far as the mortgage security of the railroad is adequate, there can, we think, be no doubt that the amount of the bonds held by the individual orators, and the lien of such bonds on the railroad as security for the payment of the same is involved in this suit. One of these plaintiffs, Mr. Bruce, being the holder of $7,500 in principal of these bonds it becomes immaterial, so far as the right of appeal is concerned, whether the orators in this case represent all the bondholders, or only such proportion of all the bonds as belong to them individually.

III.

The case of Elgin *v.* Marshal (106 U. S. 578) cited and relied on by defendant was an action at law to recover the amount of coupons detached from municipal bonds, the issue being as to the liability of the defendant for these coupons.

In the case at bar no judgment for the coupons is sought against the debtor party; the remedy sought being against the property pledged as security. The suit, therefore, is a proceeding *in rem* rather than *in personam*, and the amount involved is the value of the railroad and its earnings as security, if the debt is in excess of the value of the security, as is probable.

It appears from the defendant's answer (Rec. p. 9, bottom) that the price paid for the railroad at the sale thereof by order

of the State Court was $125,000, subject to liens estimated at $57,436.87, and subject also to the result of this suit.

IV.

Had this suit been brought, as defendant now suggests, to obtain a judgment against the defendant corporation for the amount of the coupons of plaintiffs overdue, it is obvious that the plaintiffs must have prevailed, as there was no denial of such liability on the part of the defendant. It was left to the counsel who have come into this case for the first time in this court to make the discovery that the plaintiffs are merely seeking a decree for money against a confessedly bankrupt corporation.

F. A. BROOKS,
For Plaintiffs.

117-514

MAR 20 1886
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

ALEXANDER BRUCE AND WILLIAM SHEPARD, *Appellants*,
vs.
THE MANCHESTER & KEENE RAILROAD.
No. 759.

MOTION TO DISMISS APPEAL.

And now comes the appellee and moves to dismiss the appeal in the above entitled cause for want of jurisdiction, upon the ground that the matter in dispute is not of the value of $5000.

J. W. FELLOWS,
FRANK W. HACKETT,
For Appellee.

BRIEF.

STATEMENT OF FACTS.

This is an appeal from the decree of the Circuit Court of the United States for the District of New Hampshire, 5 January, 1884, dismissing a bill in equity brought to enforce the collection of certain interest coupons. The whole record is printed.

The bill was brought in October, 1881, by Bruce and Shepard, and the Boston and Lowell Railroad, claiming to be owners of certain mortgage bonds of the Manchester and Keene Railroad, the interest coupons of which were overdue and unpaid.

It sets forth that the Manchester and Keene Railroad issued their bonds dated July 1st, 1876, and payable July 1st, 1896, with interest coupons payable semi-annually at six per cent.; and to secure payment executed a mortgage deed, naming defendants Lane, White and Dearborn, as trustees.

The bill alleges that the plaintiffs owned bonds, amounting in the aggregate to $90,000 of the principal, upon which there was overdue and unpaid a large amount of interest, viz: the sum of $20,000, or thereabouts. (P. 2.)

The bill continues:

> "Your orators show that they have applied to said trustees requesting them to take measures for the purpose of realizing the amount of the interest so in default of said bonds, and all of them, out of the possession and earnings of said railroad, and out of the rent derivable from the lease thereof to others, as provided in said deed of trust."

The bill charges that the trustees declined and refused to take these measures.

There is a further allegation that certain parties, named as defendants, had combined with certain other defendants, to effect a pretended sale of the railroad, and to pay thereby a pretended prior lien. The effect of such proceedings, the bill says, will be to deprive the plaintiffs of the benefit of their security, and render their bonds wholly worthless. (P. 4.) And the Court are asked to restrain the defendants thus named (not including, however, this appellee, the Manchester and Keene Railroad), from resisting the said

Lane, White & Dearborn, in the discharge of their duties under the mortgage.

No restraining order, however, was issued; and it appears that as to all these defendants the plaintiffs had voluntarily dismissed or discontinued their bill before the hearing, thus leaving the Manchester and Keene Railroad the only defendant. (P. 10.)

At an early stage of the suit the Boston and Lowell Railroad withdrew as a party complainant, which action left Bruce and Shepard sole plaintiffs. (P. 5.)

Subsequently to this withdrawal, the Manchester and Keene Railroad filed its answer. (P. 5–10.)

It set forth that if Bruce and Shepard owned any bonds, they were for very small amounts; and that in defendant's belief the said Bruce and Shepard were nominal plaintiffs, not joined on their own motion, or for their own interest, and that the suit was in substance and effect that of the Nashua & Lowell Railroad, by one Francis A. Brooks, attorney.

It admitted that interest on the bonds was due and unpaid. It denied various allegations of the bill, and at considerable length alleged the fact that before this bill was filed the mortgage had been in process of foreclosure, in a suit carried on in the Supreme Court of the State of New Hampshire; that the Nashua & Lowell Railroad, by said Brooks, was a party to said suit, and that the suit had proceeded to final judgment before the filing of the present bill.

Bruce and Shepard filed a replication, and testimony was taken. The cause came on to be heard 18 December, 1883, and the Court dismissed the bill, as before stated, 5th January, 1884.

The mortgage deed will be found in full on pages 16–23 of the record. It appears that the trustees are authorized, in default of payment of the interest for a period of sixty

days, to take possession of the railroad and operate it, and after paying expenses, to apply the balance to the purposes of the trust. (P. 20.)

It further appears that if default continue for six months, and if a majority of the holders of the bonds in writing so request, the trustees are authorized to declare the principal of the bonds to be payable on demand. The trustees may demand of the corporation payment of all interest due, and if the corporation do not pay within ten days, then the trustees may offer the railroad with all its property and franchises for sale at public auction.

There is no allegation in the bill that a majority of the bondholders ever requested the trustees to take this step; and one of the trustees, a witness called by plaintiffs, testifies that no such request was made of the trustees by any bondholder. (P. 13.)

POINTS OF LAW.

The matter in dispute not being of the value of $5000, this Court has no jurisdiction.

The bill invokes the equity powers of the court below to aid in collecting such sums of money as the railroad owed the plaintiffs at the date when the bill was brought. This fact is apparent, not only from the language of the bill itself, but from the testimony of plaintiffs.

Interrogatory 8, upon page 14 of the record, proposed by Mr. Brooks himself (page 12) fully confirms this. It is as follows:

"Whether or not the trustees, at any time and where were called upon by F. A. Brooks, as attorney for sundry bondholders of the Manchester & Keene Railroad, to take possession of the railroad under the provisions of the mortgage for *default of the interest*, and to operate the same and take the earnings thereof for the benefit of the bondholders, and what reply you made to such request, if any?"

Here the "matter in dispute," is the method of collecting certain interest coupons. The plaintiffs say that they are entitled for default of payment to have trustees take possession of the railroad, and apply the net earnings to the liquidation of this indebtedness. The defendants deny this right under the state of facts shown in the record. Clearly, the measure of the amount involved necessary to give jurisdiction is to be found by ascertaining the extent of the plaintiffs' claim for payment of money, the mortgage being as usual a merely collateral security. The value of these coupons at the date when the suit was brought, did not exceed $1,965; even at the date of the decree dismissing the bill, their value was not more than $2,970.

John R. Bullard, an attorney, testifies that he was employed by plaintiff, Bruce, to collect overdue coupons on seven or eight bonds of the railroad. (P. 11). That Mr. Bruce placed in his hands seven bonds of one thousand dollars each, and one of five hundred dollars, with coupons thereto belonging. Mr. Bullard produced the bonds and coupons for identification. Without criticising this method of proving Bruce's *bona fide* ownership of the bonds, it is enough to say that calculation shows that the total amount of interest due on the bonds, July 1st, 1881, is $1,695. At the time the decree of dismissal was entered (5th January, 1884), the interest had increased to $2,670.

John Shepard is named as plaintiff, and the bill is signed by "John Shepard." One *William* Shepard testifies that he is one of the plaintiffs, and that the name of "John" is incorrect. Waiving all objection on this score, we find that Mr. Shepard owned one bond at the date of filing the bill of the value of $1,000 In July, 1883, when he gave his deposition (p. 16), he testifies that there were nine coupons overdue for $30 dollars each, making $270 total. In January, 1884, when the bill was dismissed, this had increased to $300. Thus, we find that even when the Court below dis-

missed the bill, the total amount of interest then due was only $2,970.

The Court will look at the whole record to find out how much is involved in the controversy.

Schacker vs. *Insurance Co.*, 92 U. S., 241;
Banking Association vs. *Insurance Association*, 102 U. S., 121.

The latter was an appeal from a decree where the only dispute between the parties was as to the right of an insurance association to withhold a transfer of stock until the indebtedness of a stockholder to it for $2,074.36 was paid. That the stock itself, whose transfer was sought, bore a value exceeding the jurisdictional amount was immaterial. The real dispute between the parties was as to the mode of enforcing payment of the $2,074.36.

So, in the case at bar. The only dispute that the record discloses is as to the right of plaintiffs to collect $1,965 by foreclosure in equity, instead of by action at law for that sum against the railroad.

The fact that a decision denying plaintiffs the right to require the trustees under the mortgage deed, for the purpose of collecting these interest coupons, to sell the road at public auction, may operate to postpone, or even to destroy, the security for the payment of the bonds themselves, does not make the value of the bonds a measure of the amount in controversy. *Elgin* vs. *Marshall*, 106 U. S., 578.

The bonds of the Manchester and Keene Railroad by their terms are not due till 1896, (page 17), and cannot be declared payable on demand, except upon a written request of the holders of a majority of the bonds, which the record shows has never been made.

Nothing, therefore, is in dispute in this proceeding, except the mode of collecting coupons. The decision of the Court in *Elgin* vs. *Marshall*, is in point. That was a suit upon

coupons detached from municipal bonds. The validity of the bonds, themselves, necessarily came into question. The sum involved was less than $5,000; but the appellants contended that the adjudication was conclusive upon the plaintiff in error, as an estoppel of its liability to pay the entire amount of the principal sum, and as the principal of the bonds exceeded $5,000, the Court had jurisdiction. This Court said that the coupons determined the value of the matter in dispute, and that they had no jurisdiction. That the statute provisions limiting the jurisdiction of the Court.

> "Have reference to the matter which is directly in dispute, in the particular cause in which the judgment or decrees sought to be reviewed, has been rendered, and do not permit us for the purpose of determining its sums or value to estimate its collateral effect in a subsequent suit between the same or other parties." Per Mr. Justice MATTHEWS, Page 579.

The allegation in the bill that certain defendants are about to combine to effect a pretended sale and thus "postpone the security of the notes or bonds held by your orators and the other bondholders, and to deprive them of the benefit of such security and to render their bonds wholly worthless," does not convert the suit into a proceeding in which the value of the bonds themselves is involved. The record shows that plaintiffs voluntarily dismissed their bill as against all these defendants (page 27), so that no such matter was in dispute at the hearing.

For the above reasons the appeal should be dismissed.

J. W. FELLOWS,
FRANK W. HACKETT,
For Appellee.

117-594

SUPREME COURT OF THE UNITED STATES.

ALEXANDER BRUCE AND WILLIAM SHEPARD, *Appellants*,

vs.

THE MANCHESTER & KEENE RAILROAD.

No. 759.
October Term,
1885.

MOTION TO DISMISS. BRIEF IN REPLY.

The theory upon which the orator's counsel proceeded when he drew the bill (page 5), is not of such vital consequence as the question what is the value of the matter in dispute, as disclosed by the record.

We may, however, be permitted to doubt whether a mere allegation in the bill that the plaintiff had filed it in behalf of all like creditors, not citizens of New Hampshire, would have entitled plaintiffs to a decree (supposing the Court below had sustained the bill) for an "account of all sums due on all the bonds outstanding, etc." (Page 5). The Court would hardly have gone so far in a suit by two individuals holding a total of $8,500 bonds out of $500,000, and whose invitation to come in and join in the litigation, does not appear to have enticed a single other creditor, though the suit was pending for more than two years. Were it needful, we might suggest that the views of this Court in *Hawes* vs. *Oakland*, 104 U. S., 450, are not without pertinency in this regard.

That the appellants would have liked to get control of a railroad worth more than the jurisdictional amount, we are not prepared to deny; nor do we contest the point that the Court below, finding other grounds for dismissing the bill, did not take occasion to consider the question of the amount involved, as affecting its jurisdiction.

A test of value is found by considering that defendants could have had the proceedings dismissed at any time by paying the amount of the overdue coupons and costs. This is admitted to be less than $2,000.

An analogy is found in the practice governing creditors' bills.

Although a bill be filed by a creditor, at the instance of himself and all others who may wish to come in, it is nevertheless, up to the time of the decree, a suit only between party and party. Up to that time the plaintiff may make any disposition of the case which he sees fit; and the defendant, who is the debtor, may tender satisfaction and compel him to accept it. *McDougald* vs. *Dougherty*, 11 Geo. 570.

This suit is simply between Bruce and Shepard on one side, and the M. & K. R. R. on the other. The only interest appellants had at the date of decree is measured by the debt that the railroad owed them.

Divested of all surmises as to what the plaintiffs intended, or what they now say was "understood by all parties and their counsel" (page 4), the fact remains that the sole question to consider upon this motion is, how much money are the parties disputing about? The record is not long; it is all in print, and we believe it will not take much time to discover that the only real right of plaintiffs in this suit (if any) under the deed of trust was to have the trustees proceed to aid them in the collection of their overdue coupons. It is evident that the other holders were content with a different remedy.

The matter in dispute here, exclusive of costs, not being shown to exceed the sum of five thousand dollars, we respectfully ask the Court to dismiss the appeal. *Seaver* vs. *Bigelow*, 5 Wall., 203.

J. W. FELLOWS,
FRANK W. HACKETT,
For Appellee.

117-576

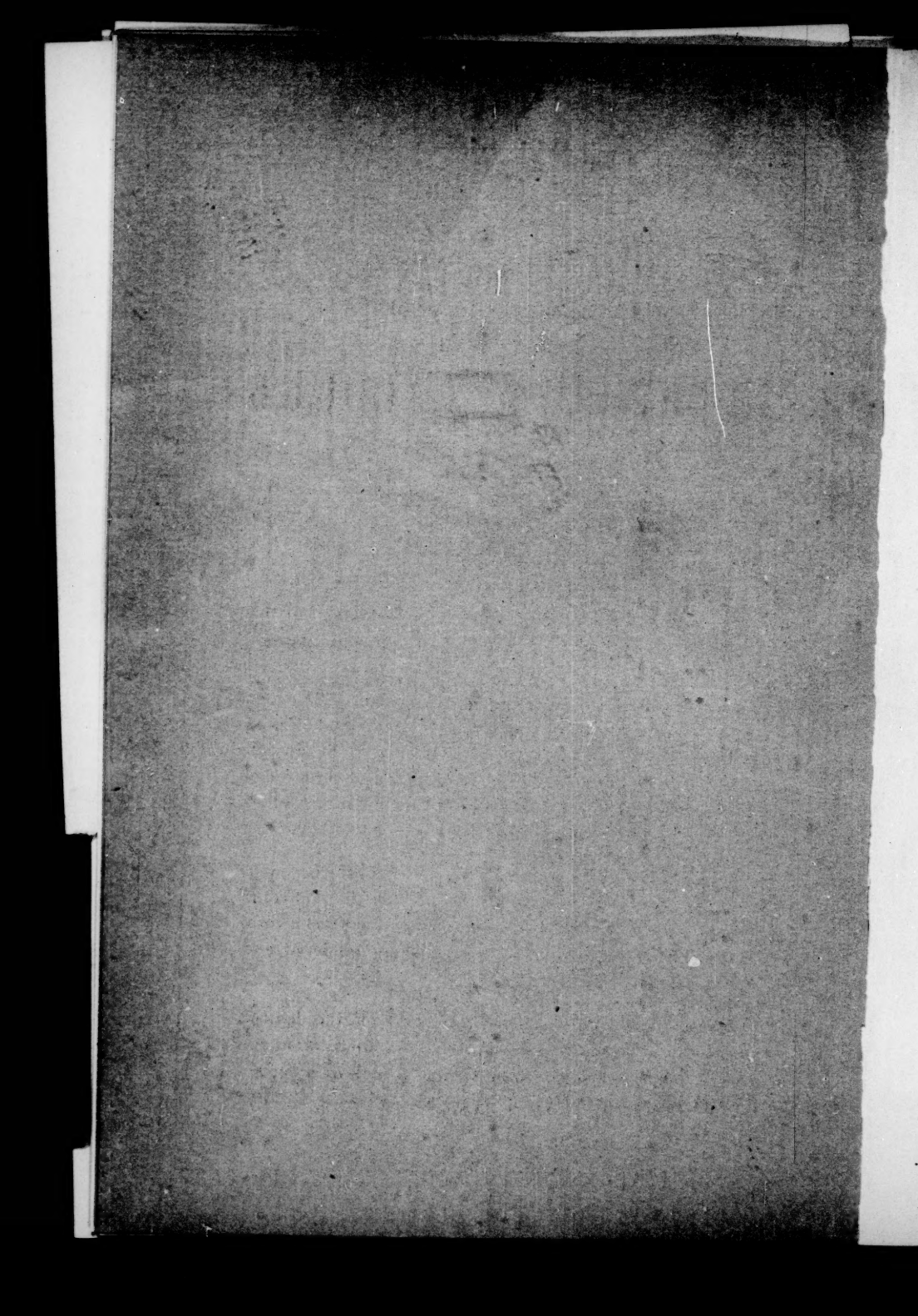
Supreme Court of the United States.

OCTOBER TERM, 1885.

EX PARTE, CHARLES W. FONDA.

RECORD.

DETROIT:
JOHN F. EBY & CO., BOOK AND JOB PRINTERS.
1886.



UNITED STATES OF AMERICA.

IN THE SUPREME COURT

EX PARTE CHARLES W. FONDA.

PETITION.

To the Honorable the Supreme Court of the United States:

The petition of Charles W. Fonda, late a resident of the village of Constantine, county of St. Joseph, and State of Michigan, respectfully shows:

First—That on the 10th day of November, 1885, your petitioner was sentenced to imprisonment in the State Prison at Jackson, Michigan, by the Circuit Court of St. Joseph county in said State, for the term and period of three years and six months from and including the day aforesaid, as will appear from a copy of said sentence hereto attached.

Second—That the conviction of your petitioner, upon which said sentence was based, was procured in said court on the 31st day of October, 1885, as will appear from a copy of the verdict of the jury then and there rendered and hereto attached.

Third—That your petitioner was tried on the day last aforesaid, by the court aforesaid, for the commission of the several offenses charged against him in and by a certain information, a copy of which is hereto attached.

Fourth—Your petitioner further shows that said conviction and sentence were had and imposed upon the 3d and 4th counts of said information, *exclusively*, as will appear by reference to the verdict hereto attached.

Fifth—That in pursuance of the execution of said sentence, your petitioner is now confined in said State Prison, and is restrained of his liberty illegally, forcibly and against his will by one Hiram F. Hatch, the warden and keeper thereof.

Sixth—That your petitioner was employed by the Farmers' National Bank of Constantine in the capacity of clerk, and by virtue of said employment acted as the general manager of the affairs of said bank, and had full control and the custody of its funds during the whole period covered by the dates upon which the alleged embezzlements are charged to have been committed in the information hereto attached.

Seventh—Your petitioner is advised, and therefore alleges that said imprisonment, confinement and detention are unwarranted and illegal in this:

I.

Because your petitioner is convicted, sentenced and imprisoned contrary to the provisions of the Constitution of the United States and the laws of Congress.

II.

Because the acts described and charged in the third and fourth counts of the information (being embezzlement of the funds and property of a National bank by a clerk

therein) are cognizable by the federal courts, and the jurisdiction to try your petitioner and to punish said crime is vested exclusively in said courts; the action of said State court is in violation of Article I, Section 8, Parts 5 and 17 of the Constitution of the United States; also of Section 711, Part 1, of the Revised Statutes of the United States, and Section 5209 of said statutes, which provides a punishment for the crime of which your petitioner stands convicted.

III.

Because he was held to answer for, and was convicted of an infamous crime as charged in the third and fourth counts of said information without presentment or indictment by a grand jury.

Your petitioner annexes hereto copies of Complaint (p. 4), Warrant (p. 5), Information (p. 7), Verdict (p. 14), Sentence (p. 15), and Commitment (p. 16), in record of said State court.

Your petitioner therefore prays that a Writ of *Habeas Corpus* may be issued out of and under the seal of this court, directed to said Hiram F. Hatch, commanding him to bring your petitioner before this honorable court at a certain time in order that this court may inquire into the matter of your petitioner's detention and imprisonment, and that he may be released and discharged from the same.

CHARLES W. FONDA,
Petitioner,

EDWIN F. CONELY,
FRANK P. GUISE,
Attorneys for Petitioner.

Witnesses:
S. H. AVERY.
CHAS. H. SMITH.

STATE OF MICHIGAN, } ss.
COUNTY OF JACKSON. }

Personally appeared before me this 11th day of March, 1886, Charles W. Fonda, who signed the foregoing petition, and made oath that he had read the same, and knows the contents thereof, and that the same are true.

CHAS. H. SMITH,
Notary Public, Jackson County, Mich.

COPY OF COMPLAINT.

STATE OF MICHIGAN, } ss.
ST. JOSEPH COUNTY. }

The complaint of the Farmers' National Bank of Constantine, taken and made before me, Thomas Harrison, Esq., a justice of the peace in and for said county, at my office in the village of Constantine in said county, on the twenty-seventh day of June, A. D. 1885. Charles W. Cond, being sworn, says that he is the president of the Farmers' National Bank of Constantine aforesaid, and that he is authorized to make this complaint in behalf of the said bank against Charles W. Fonda as hereinafter stated. And the said Charles W. Cond says that heretofore, to wit, on the twenty-fifth day of January, A. D. 1881, the said Charles W. Fonda did steal, take and carry away with a felonious intent a large sum of money, to wit, the sum of fifteen thousand dollars, at Constantine in the county of St. Joseph in the State of Michigan aforesaid, the said sum of money so stolen, taken and carried away by the said Charles W. Fonda being the money of the said Farmers' National Bank of Constantine, and said money

was stolen, taken and carried away by the said Charles W. Fonda without the consent and against the will of the said Farmers' National Bank of Constantine, contrary to the statutes in such case made and provided, and against the peace and dignity of the people of the State of Michigan. Wherefore, the said Farmers' National Bank of Constantine and the said Charles W. Cond pray that the said Charles W. Fonda may be apprehended and held to answer this complaint and further dealt with in relation to the same as law and justice may require.

CHARLES W. COND.

Taken, subscribed and sworn to before me,
the day and year first above written.
THOMAS HARRISON,
Justice of the Peace.

ENDORSED:

People, etc., *vs.* Charles W. Fonda. Complaint. Filed June 27, 1885. Thomas Harrison, Justice of the Peace.

COPY OF WARRANT.

STATE OF MICHIGAN, } ss.
COUNTY OF ST. JOSEPH. }

To the sheriff or any constable of said county—GREETING:—

Whereas Charles W. Cond hath this day made complaint in writing and on oath to me, Thomas Harrison, one of the justices of the peace for and in said county, that heretofore, to wit, on the twenty-fifth day of January, A. D. 1881, at the township of Constantine in the county aforesaid, one Charles W. Fonda, late of said county, did steal, take and carry away, with felonious intent, a large sum of money, to

wit, the sum of fifteen thousand dollars, at Constantine, in the county of St. Joseph and State of Michigan aforesaid; the said sum of money so stolen, taken and carried away by the said Charles W. Fonda, being the money of the Farmers' National Bank of Constantine, and said money was stolen, taken and carried away by the said Charles W. Fonda without the consent and against the will of the said Farmers' National Bank of Constantine; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan. And whereas, on examination, on oath, of the said Charles W. Cond by me, the said justice of the peace, it appears to me, the said justice of the peace, that said offense has been committed, and that there is just cause to suspect the said Charles W. Fonda to have been guilty thereof. Therefore, in the name of the people of the State of Michigan, you and each of you are hereby commanded forthwith to take the said Charles W. Fonda and bring him before me, the said justice of the peace, or some other justice of the peace of said county, to be dealt with according to law. And you are further commanded, in the name of the people of the State of Michigan, to summon * * * to appear before me the said * * * (when and where you shall have the said accused part) to testify * * * knowledge on behalf of said people, touching the matter of said complaint.

Given under my hand and seal at the township of Constantine in said county, on the twenty-seventh day of June, A. D. 1885.

THOMAS HARRISON, [SEAL.]
Justice of the Peace.

STATE OF MICHIGAN, } ss.
COUNTY OF ST. JOSEPH. }

I hereby certify and return that by virtue of the within warrant to me directed, I have taken and arrested the within named Charles W. Fonda, and now have him before Thomas Harrison, the justice within named, as I am within commanded to do; and I hereby further certify and return that I have summoned * * * to appear and testify, as I am within commanded to do.

Dated this 28th day of June, A. D. 1885.

THOMAS S. BAILEY,
Constable.

ENDORSED:

Justice Court. People of the State of Michigan *vs.* Charles W. Fonda. Warrant.

COPY OF INFORMATION.

STATE OF MICHIGAN, } ss.
COUNTY OF ST. JOSEPH. }

The Circuit Court for the County of St. Joseph: Of the July term in the year A. D. 1885.

First count:

David L. Akey, prosecuting attorney in and for the county of St. Joseph aforesaid, for and in behalf of the people of the State of Michigan, comes into court in the July term thereof, in the year one thousand eight hundred and eighty-five, and gives the court here to understand and be informed that Charles W. Fonda, late of the township of Constantine in the county aforesaid, heretofore, to wit, on the 25th day of January, in the year one thousand eight hundred and eighty-one, at the township of Constantine in the county of St. Joseph aforesaid, being then and there

a servant and clerk of the Farmers' National Bank of Constantine, Michigan, an incorporated banking institution, organized and existing under the laws of the United States providing for the creation of national banking associations, then and there doing business as such bank, fraudulently embezzled and fraudulently and feloniously converted to his own use a large sum of money, to wit, two thousand dollars, of the value of two thousand dollars, then and there belonging to and in possession of said Farmers' National Bank of Constantine, Michigan, without the consent of the said Farmers' National Bank of Constantine, Michigan, contrary to the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

Second count:

And the said prosecuting attorney, who prosecutes as aforesaid, further gives the said court here to understand and be informed that Charles W. Fonda, late of the township of Constantine in the county of St. Joseph aforesaid, on the 18th day of June, A. D. 1881, at the village of Constantine in the county aforesaid, being then and there a servant and clerk of the Farmers' National Bank of Constantine, Michigan, an incorporated banking institution, organized and existing under the laws of the United States providing for the creation of national banking associations, then and there doing business as such bank, fraudulently embezzled and fraudulently and feloniously converted to his own use a large sum of money, to wit, three thousand six hundred dollars, of the value of three thousand six hundred dollars, then and there belonging to and in possession of said Farmers' National Bank of Constantine, Michigan, without the consent of the Farmers' National Bank of Constantine, Michigan; contrary to the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

Third count:

And the said prosecuting attorney, who prosecutes as aforesaid, further gives the said court here to understand and be informed that Charles W. Fonda, late of the township of Constantine in the county of St. Joseph aforesaid, on the the 25th day of January, A. D. 1881, at the village of Constantine in the county aforesaid, being then and there a servant and clerk of the Farmers' National Bank of Constantine, Michigan, "an incorporated banking institution, organized and existing under the laws of the United States providing for the creation of national banking associations," and not being then and there an apprentice nor other person under the age of sixteen years, did, by virtue of his said employment, then and there, and whilst he was a servant and clerk as aforesaid, receive and take into his possession certain money to a large amount, to the amount of two thousand dollars and of the value of two thousand dollars of the property of the said Farmers' National Bank of Constantine, Michigan, and which said money came to the possession of the said Charles W. Fonda by virtue of said employment, and the said money then and there fraudulently and feloniously did embezzle and convert to his own use, without the consent of the said Farmers' National Bank of Constantine, Michigan, his said employer, and the said Charles W. Fonda then and there in manner and form aforesaid the said money, the property of the said Farmers' National Bank of Constantine, Michigan, his said employer, from the said Farmers' National Bank of Constantine, Michigan, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

Fourth count:

And the said prosecuting attorney, who prosecutes as aforesaid, further gives the said court here to understand and be informed that Charles W. Fonda, late of the township of Constantine in the county of St. Joseph aforesaid, on the fourth day of December, A. D. 1880, at the village of Constantine in the county aforesaid, being then and there a servant and clerk of the Farmers' National Bank of Constantine, Michigan, "an incorporated banking institution organized and existing under the laws of the United States providing for the creation of national banking associations," and not being then and there an apprentice nor other person under the age of sixteen years, did, by virtue of his said employment, then and there and whilst he was a servant and clerk as aforesaid, receive and take into his possession certain money to a large amount, to the amount of one thousand dollars and of the value of one thousand dollars, of the property of the said Farmers' National Bank of Constantine, Michigan, and which said money came to the possession of the said Charles W. Fonda by virtue of said employment, and the said money then and there fraudulently and feloniously did embezzle and convert to his own use, without the consent of the said Farmers' National Bank of Constantine, Michigan, his said employer, and the said Charles W. Fonda then and there in manner and form aforesaid, the said money, the property of the said Farmers' National Bank of Constantine, Michigan, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

Fifth count:

And the said prosecuting attorney, who prosecutes as aforesaid, further gives the said court here to understand and be informed that Charles W. Fonda late of the town-

ship of Constantine in the county of St. Joseph aforesaid, heretofore, to wit, on the 25th day of January, A. D. 1881, at the township of Constantine in the county of St. Joseph aforesaid, a large sum of money, the sum of two thousand dollars, of the value of two thousand dollars, of the goods, chattels and property of the Farmers' National Bank of Constantine, Michigan, "an incorporated banking institution, organized and existing under the laws of the United States providing for the creation of national banking associations," there being found, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

Sixth count:

And the said prosecuting attorney, who prosecutes as aforesaid, further gives the said court here to understand and be informed that Charles W. Fonda, late of the township of Constantine in the county of St. Joseph aforesaid, heretofore, to wit, on the 18th day of June. A. D. 1881, at the township of Constantine in the county of St. Joseph aforesaid, a large sum of money, the sum of three thousand six hundred dollars, of the value of three thousand six hundred dollars, of the goods, chattels and property of the Farmers' National Bank of Constantine, Michigan, "an incorporated banking institution organized and existing under the laws of the United States providing for the creation of national banking associations," there being found, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

Seventh count:

And the said prosecuting attorney, who prosecutes as aforesaid, further gives the said court here to understand and be informed that Charles W. Fonda, late of the town-

ship of Constantine in the county of St. Joseph aforesaid, heretofore, to wit, on the fourth day of December, A. D. 1880, at the township of Constantine in the county of St. Joseph aforesaid, a large sum of money, the sum of fifteen hundred dollars, of the value of fifteen hundred dollars, of the goods, chattels and property of the Farmers' National Bank of Constantine, Michigan, "an incorporated banking institution organized and existing under the laws of the United States providing for the creation of national banking associations," there being found, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

Eighth count:

And the said prosecuting attorney, who prosecutes as aforesaid, further gives the said court here to understand and be informed that Charles W. Fonda, late of the township of Constantine in the county of St. Joseph aforesaid, heretofore, to wit, on the fifth day of July, A. D. 1881, at the township of Constantine in the county of St. Joseph aforesaid, a large sum of money, the sum of one thousand dollars, of the value of one thousand dollars, of the goods, chattels and property of the Farmers' National Bank of Constantine, Michigan, "an incorporated banking institution organized and existing under the laws of the United States providing for the creation of national banking associations," there being found, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

Ninth count:

And the said prosecuting attorney, who prosecutes as aforesaid, further gives the said court here to understand and be informed that Charles W. Fonda, late of the town-

ship of Constantine in the county of St. Joseph aforesaid, heretofore, to wit, on the 28th day of August, A. D. 1880, at the township of Constantine in the county of St. Joseph aforesaid, a large sum of money, the sum of fifteen hundred dollars, of the value of fifteen hundred dollars, of the goods, chattels and property of the Farmers' National Bank of Constantine, Michigan, "an incorporated banking institution organized and existing under the laws of the United States providing for the creation of national banking associations," there being found, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

DAVID L. AKEY,
Prosecuting Attorney for the County of St. Joseph.

STATE OF MICHIGAN, } ss.
COUNTY OF ST. JOSEPH. }

David L. Akey being duly sworn deposeth and says, that he knows the contents of the above information and he verily believes the same to be true as therein set forth.

DAVID L. AKEY.

Sworn and subscribed before me, at Centreville, Mich., this 21st day of July, A. D. 1885.

CHAS. A. STURGES,
Clerk, Ct. Ct.

People's witnesses:

Charles W. Cond, William B. Pierson, John G. Shurtz, J. Hogarth, Chas. H. Barry, Jr., John B. Shipman.

ENDORSED:

In the Circuit Court for the county of St. Joseph. The People of the State of Michigan *vs.* Charles W. Fonda. Information for Embezzlement, etc. Filed this 21st day of July, A. D. 1885: Of the July Term, Chas. A. Sturges, Clerk. David L. Akey, Prosecuting Attorney.

COPY OF VERDICT.

October Term. Sixth day. October 31st, A. D. 1885: Regular session of the Circuit Court for the county of St. Joseph and State of Michigan, continued and held at the Court House in the village of Centreville, in said county on Saturday the 31st day of October, A. D. 1885.

Present, Hon. Russel R. Pealer, Circuit Judge.

Court was opened for business in due form.

THE PEOPLE OF THE STATE OF MICHIGAN vs. CHARLES W. FONDA, *Respondent.*	*Larceny.*

In this cause the respondent Charles W. Fonda being present in open court, the jury heretofore empaneled and sworn herein sat together and heard the arguments of counsel and the charge of the court, retired from the bar thereof under the charge of Cyrus R. Buell, an officer of the court duly sworn for that purpose, to consider of their verdict to be given, and after being absent for a time return into court and say, upon their oath, that they find the said Charles W. Fonda guilty in manner and form as the said people have in the third and fourth counts in their information in this cause charged. Whereupon it is ordered by the court now here that the said respondent be remanded to the Common Jail of the county of St. Joseph to await the sentence and judgment of this court.

RUSSEL R. PEALER,
Circuit Judge.

COPY OF SENTENCE.

October Term. Fourteenth day. November 10th, A. D. 1885: Regular session of the Circuit Court for the county of St. Joseph and State of Michigan, continued and held at the Court House in the village of Centreville in said county on Tuesday the 10th day of November, A. D. 1885.

Present, Hon. Russel R. Pealer, Circuit Judge.

Court was opened for business in due form.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
CHARLES W. FONDA,
Respondent.
} *Larceny.*

In this cause Charles W. Fonda the respondent having been by the verdict of the jury duly convicted of the crime of statutory larceny, as appears by the record thereof, and having been, on motion of the prosecuting attorney of the county, duly arraigned at the bar in open court, and having then been asked by the court whether he had anything to say why judgment should not be pronounced against him, and alleging no reason to the contrary: Therefore it is ordered and adjudged by the said court now here that the said Charles W. Fonda be confined in the State Prison at Jackson in this State for the period of three years and six months from and including this day.

RUSSEL R. PEALER,
Circuit Judge.

COPY OF COMMITMENT AND RETURN.

STATE OF MICHIGAN, } ss.
COUNTY OF ST. JOSEPH. }

In the name of the People of the State of Michigan,

To the Sheriff of St. Joseph County, GREETING:

Whereas, Charles W. Fonda has lately, in the Circuit Court for the county of St. Joseph, been duly convicted of the crime of statutory larceny and sentenced therefor to imprisonment in the State Prison at Jackson, for the period of three and one-half years from and including the day of his said sentence as more fully appears by a certified abstract from the minutes of said court of such conviction and sentence herewith delivered to you and accompanying this warrant; you are, therefore, commanded to cause the said Charles W. Fonda, without needless delay, to be removed from the jail of the said county of St. Joseph to the State Prison at Jackson.

Witness, the Hon. Russel R. Pealer, Circuit Judge, at the Court House in the village of Centreville, this eleventh day of November, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL]

CHARLES A. STURGES,
Clerk of said Circuit Court.

STATE OF MICHIGAN, } ss.
COUNTY OF ST. JOSEPH. }

I hereby certify and return, that on the sixteenth day of of November, 1885, I did cause Charles W. Fonda, within named, to be removed from the jail of said county to the State Prison at Jackson, as I am within commanded.

Dated November 18, 1885.

CARLOS E. DEXTER,
Sheriff.

STATE PRISON AT JACKSON,

Received the within named Charles W. Fonda into my custody in this prison.

Dated November 16th, 1885.

H. F. HATCH,
Warden,
T.

ENDORSED:

In the Circuit Court for the county of St. Joseph. The People *vs.* Charles W. Fonda. Warrant for removal of prisoner to State Prison. Filed this 18th day of November, 1885.

CHARLES A. STURGES,
Clerk.

STATE OF MICHIGAN, } *ss.*
COUNTY OF ST. JOSEPH. }

I, Charles A. Sturges, Clerk of the county of St. Joseph and of the Circuit Court thereof, do hereby certify that the same is a court of record having a clerk and seal, and that the above and foregoing is a true and correct transcript of the original complaint, warrant, information, verdict of the jury, sentence and the warrant for removal now of record or remaining in my office in a certain cause wherein the People of the State of Michigan is plaintiff and Charles W. Fonda is respondent, and the whole of such original complaint, warrant, information, verdict, sentence and warrant for removal, and that I have compared this transcript with said original complaint, warrant, information, verdict, sentence and warrant for removal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at Centreville, Mich., this twenty-fifth day of February, A. D. 1886.

[SEAL.]

CHAS A. STURGES.
Clerk.

COPY OF COMMITMENT AND RETURN.

STATE OF MICHIGAN, } ss.
COUNTY OF ST. JOSEPH. }

In the name of the People of the State of Michigan,

To the Sheriff of St. Joseph County, GREETING:

Whereas, Charles W. Fonda has lately, in the Circuit Court for the county of St. Joseph, been duly convicted of the crime of statutory larceny and sentenced therefor to imprisonment in the State Prison at Jackson, for the period of three and one-half years from and including the day of his said sentence as more fully appears by a certified abstract from the minutes of said court of such conviction and sentence herewith delivered to you and accompanying this warrant; you are, therefore, commanded to cause the said Charles W. Fonda, without needless delay, to be removed from the jail of the said county of St. Joseph to the State Prison at Jackson.

[SEAL]

Witness, the Hon. Russel R. Pealer, Circuit Judge, at the Court House in the village of Centreville, this eleventh day of November, in the year of our Lord one thousand eight hundred and eighty-five.

CHARLES A. STURGES,
Clerk of said Circuit Court.

STATE OF MICHIGAN, } ss.
COUNTY OF ST. JOSEPH. }

I hereby certify and return, that on the sixteenth day of of November, 1885, I did cause Charles W. Fonda, within named, to be removed from the jail of said county to the State Prison at Jackson, as I am within commanded.

Dated November 18, 1885.

CARLOS E. DEXTER,
Sheriff.

STATE PRISON AT JACKSON,

Received the within named Charles W. Fonda into my custody in this prison.

Dated November 16th, 1885.

H. F. HATCH,
Warden,
T.

ENDORSED:

In the Circuit Court for the county of St. Joseph. The People *vs.* Charles W. Fonda. Warrant for removal of prisoner to State Prison. Filed this 18th day of November, 1885.

CHARLES A. STURGES,
Clerk.

STATE OF MICHIGAN, } *ss.*
COUNTY OF ST. JOSEPH. }

I, Charles A. Sturges, Clerk of the county of St. Joseph and of the Circuit Court thereof, do hereby certify that the same is a court of record having a clerk and seal, and that the above and foregoing is a true and correct transcript of the original complaint, warrant, information, verdict of the jury, sentence and the warrant for removal now of record or remaining in my office in a certain cause wherein the People of the State of Michigan is plaintiff and Charles W. Fonda is respondent, and the whole of such original complaint, warrant, information, verdict, sentence and warrant for removal, and that I have compared this transcript with said original complaint, warrant, information, verdict, sentence and warrant for removal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at Centreville, Mich., this twenty-fifth day of February, A. D. 1886.

[SEAL.]

CHAS A. STURGES.
Clerk.

117-516

UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

EX PARTE, CHARLES W. FONDA.

Brief of Edwin F. Conely and Frank P. Guise, in favor of Petitioner.

DETROIT:
JOHN F. EBY & CO., BOOK AND JOB PRINTERS.
1886.

UNITED STATES OF AMERICA.

IN THE SUPREME COURT

EX PARTE CHARLES W. FONDA.

BRIEF FOR PETITIONER.

I.

Fonda, the petitioner, a clerk employed by the First National Bank of Constantine, Michigan, an incorporated banking association organized and operating under the laws of the United States, providing for the incorporation of such institutions, was accused of embezzling certain of the funds of the bank, which came into his charge by virtue of his employment. Complaint was made against him before a local justice of the peace, wherein he was charged with simple larceny at the common law.

Vide **Complaint and Warrant.**

Upon this complaint he was held for trial in the Circuit Court for the county of St. Joseph, wherein he was proceeded against by information instead of indictment. By the statutes of Michigan, both methods of procedure are lawful in all cases falling within the jurisdiction of the State courts of record, but that by information has long been the common method. The information against Fonda

contained *nine* counts, in all of which he was charged with either:

1. Embezzlement of the funds of the bank, or
2. Larceny of the goods and chattels of the bank.

He was put upon trial upon all of these counts, but was found guilty only of the charges contained in the 3d and 4th. He therefore stands legally acquitted of all the other charges.

II.

Had the State court jurisdiction to try and punish the petitioner for the offense (for it is really but one offense) charged in the 3d and 4th counts of the information?

The charge in these counts is laid under a general statute of Michigan, adopted prior to the National Banking Act, and creating an offense not punishable by the common law.

2 Howell's Statutes, Sec. 9151.

It reads as follows:

"If any officer, agent, clerk or servant of any incorporated company, or of any city, township, incorporated town or village, school district, or other public or municipal corporation, or if any clerk, agent, or servant of any private persons, or of a copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently dispose of or convert to his own use, or shall take or secrete, with intent to embezzle and to convert to his own use, without the consent of his employer or master, any money or other property of another, which shall have come to his possession, or shall be under his charge by virtue of such office or employment, he shall be deemed by so doing to have committed the crime of larceny."

It is apparent that this statute has no special application to national banks, and it was, in fact, adopted prior and without reference to any such system.

The facts alleged in the 3d and 4th counts of the informa-

tion, clearly constitute, however, a case falling within the provisions of

Rev. Stat. U. S., Sec. 5209,

which reads as follows:

"Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts or willfully misapplies any of the moneys, funds or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

It is charged in these counts "that Charles W. Fonda, late of, etc., on, etc., at, etc., being then and there a servant and clerk of the Farmers' National Bank of Constantine, Michigan, an incorporated banking institution, organized and existing under the laws of the United States providing for the creation of National Banking Associations, * * * * * * * * did, by virtue of his said employment, then and there, and whilst he was a servant and clerk as aforesaid, receive and take into his possession certain money, etc., of the property of the said Farmers' National Bank, and which said money came to the possession of the said Charles W. Fonda by virtue of said employment, and the said

money then and there fraudulently and feloniously did embezzle and convert to his own use without the consent of the said Farmers' National Bank," etc., etc., etc.

The pleader, in his endeavor to bring the petitioner within the reach of the Michigan statute, has stated, with great clearness and accuracy, a case falling within the scope of the Act of Congress and the jurisdiction of the U. S. Circuit Court for the western district of Michigan.

This jurisdiction, we contend, was *exclusive*.

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be *exclusive* of the courts of the several States:

First—Of all crimes and offenses cognizable under the authority of the United States."

Rev. Stat. U. S., Sec. 711

Congress created the national banking system, adopted regulations therefor, and provided a punishment for the offense charged against the petitioner.

Rev. Stat. U. S., Title LXII.

That it had authority, under the Constitution, so to do and to pass all laws necessary and appropriate to the complete protection and internal security of banking institutions established under such legislation, will not admit of discussion at this late day.

It therefore follows that the jurisdiction to try and punish persons for offenses against the provisions of the chapter of the Revised Statutes just mentioned, is vested exclusively in the Federal courts, and that the State courts are without authority in such cases.

It is well established that Congress may exclude the jurisdiction of the State courts over offenses within the power of Congress to punish.

Houston vs. Moore, 5 Wheat., 1.
The Moses Taylor, 4 Wall., 411.

Martin vs. Hunter, 1 Wheat., 304.
Comm. vs. Fuller, 8 Met., 313.
1 Kent's Comm., 399.
U. S. ex. rel. Spink, 19 Fed. Rep., 631.

And it has been held that, even in cases to which State authority might extend in the absence of federal legislation, when Congress assumed to exercise its jurisdiction, its control was paramount and exclusive.

***Vide* cases cited below.**

And this must be the rule.

Were it otherwise, whatever policy the Federal Government might establish, whatever direction its action might take in respect to the cases last mentioned, the same would be varied, impeded, perhaps wholly thwarted by local legislation. *A fortiori* when, like national banks, the subject is within the exclusive control of the general government.

Some of the peculiar results arising from State interference in affairs of national concern, present themselves in this case.

By the U. S. statute the offense charged against the petitioner is a misdemeanor.

Rev. Stat. U. S., Sec. 5209.

By the Michigan statute above quoted,

2 Howell's Stat., Sec. 9151,

taken in connection with the statute of that State relative to larceny,

2 Howell's Stat., Sec. 9140,

with that relative to the State Prison,

2 Howell's Stat., Sec. 9697,

and with that defining "felony" and "felonious,"

2 Howell's Stat., Sec. 9430, 9431,

the same offense, if within the local jurisdiction, is of a

felonious nature, and punishable by imprisonment in the State Prison at hard labor.

In Michigan, in such case the offender may be prosecuted by simple information. Under the Constitution of the United States, for an offense so grave as the State statute makes that charged against the petitioner, the intervention of a grand jury is essential. To permit the State to make the acts charged against the petitioner an infamous crime is to produce one of two results:

1. Two distinct offenses are created, one against the State and one against the United States, and the accused can be twice punished for the same act; or,

2. If the accused cannot be twice punished for the same act, then the State, by its legislation and action thereunder, deprives the accused of the protection afforded by the Federal Constitution in its guaranty that no one shall be put upon trial for an infamous crime except by the indictment of the grand jury.

Const. U. S., Art. V of Amendments.
Ex Parte Wilson, 114 U. S., 426.
U. S. vs. Tod, 25 Fed. Rep., 815.

Another incongruity appears in this that by the State statutes,

2 Howell's Stat., Sec. 9507,

the prosecution is not yet barred, *six* years being the limitation. But by the U. S. statute,

Rev. Stat. U. S., Sec. 1044,

the prosecution could not have been maintained, *three* years being the limitation therein provided.

Can it be said that Congress, while bringing this class of cases within the limitation last mentioned, still contemplated that each State had authority to deprive such limitation of all force and effect by extending the period of prosecution to six, ten, twenty years, or indefinitely?

Further, we think it may be fairly asked whether the State can thus, by its action in respect to acts concerning which Congress may legislate and has legislated, remove a person accused of such acts beyond the reach of the executive clemency of the President?

In all criminal prosecutions under the laws of the United States, the accused must be tried by jury under regulations established by Congress.

Const. U. S., Art. III., sec. 2.
Const. U. S., Art. VI. of Amendments.

How, then, in cases of offenses against such laws, can this protection be secured if the State can, at will, make such offenses crimes against itself, and thereby control the procedure?

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Const. U. S., Art. VI.

In view of this provision and of the considerations above suggested, we think it may be justly said that the Constitution, laws and treaties of the United States constitute a complete whole, and are to be considered in their entirety and in their relations to each other, and that State legislation which, while not apparently conflicting with some parts thereof, so far affects others as to seriously interfere with the full and harmonious operation of all, must be deemed constitutionally defective or improperly applied.

We think that the weight of authority sustains our position.

Ex parte Dock Bridges, 2 Woods, 428, was an indict-

ment in a State court for perjury committed in the course of a judicial investigation, conducted under the authority of acts of Congress, and it was held to be an offense against the public justice of the United States, and exclusively cognizable in the courts of the United States, and it was further held that a person who was convicted in a State court for the offense mentioned, and was undergoing imprisonment in the penitentiary therefor, could be discharged on *habeas corpus* issued from a court of the United States.

Mr. Justice Bradley, sitting at circuit in this case (page 430), says: "At all events, Congress has declared that the courts of the United States shall have cognizance, exclusive of the State courts, of all crimes and offenses cognizable under its authority. Hence it was clearly in violation of the laws of the United States for the State court to try and imprison the defendant for the crime in question. The court had no jurisdiction of the case. The proceedings were null and void."

It is also there held that "where a proceeding in a State court is void for want of jurisdiction, *habeas corpus* will lie from the United States court, and may be issued by any court or judge invested with supervisory jurisdiction in such case;" citing

Ex parte Lange, 18 Wall., 163.

In the case of *Brosnahan, jr.*, 18 Fed. Rep., 62, Mr. Justice Miller held that "the Circuit Court of the United States may issue the writ of *habeas corpus* upon the application of any person who is imprisoned in violation of the Constitution, or of any law or treaty of the United States, and if a person be imprisoned under a State statute which is in conflict with either, that court has power to discharge him." See also note, page 74, sec. 8.

In *Ex parte Houghton*, 7 Fed. Rep., 657, Judge Wheeler, after a very careful and critical examination of this subject, says in his opinion that "a State has no jurisdiction over

the offense of passing counterfeit national bank bills," and that "a writ of *habeas corpus* from a Federal court is the proper remedy where one is restrained of his liberty by a State court for the commission of such an offense."

In *Comm. vs. Felton*, 101 Mass., 207, which was an indictment for being an accessory to *an embezzlement by an officer of a national bank*, the court used the following language:

"The difficulty in the way of holding the defendant upon the present indictment is: *that the act of Congress has taken the crime of the principal out of our jurisdiction;* our courts cannot deal with him (the principal) upon that charge. By the terms of the same act, which in this latter is the *controlling authority*, the crime of the principal has ceased to be a *felony*, and has become a *misdemeanor* only, a description of crime in which there are no accessories."

Various phases of this question have been considered in other cases, and it may be considered as settled that whereever, in cases falling within federal jurisdiction, Congress in its judgment sees fit to provide a punishment for a crime, its legislation supersedes all State legislation on the subject.

Vide

Prigg v. Comm., 16 Pet., 539.
Sturges v. Crowninshield, 4 Wheat., 122.
Martin v. Hunter, 1 Wheat., 304.
Houston v. Moore, 5 Wheat., 1.
The Moses Taylor, 4 Wall., 411.
Comm. v. Fuller, 8 Met., 313.
Comm. v. Tenney, 97 Mass., 50.
State v. Adams, 4 Blackf., 146.
State v. Pike, 15 N. H., 83.
People v. Kelley, 38 Cal., 145.
People v. Sweetman, 3 Parker's Crim. Rep., 358.
State v. Tuller, 34 Conn., 280.
Ketner v. Comm., 92 Penn. S., 372.
Farmers & Mechanics' Bank v. Dearing, 91 U. S., 29.